SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No.

MISSOURI PACIFIC RAILROAD COMPANY, A CORPORATION, PETITIONER,

vs.

HARTLEY BROTHERS, A COPARTNERSHIP COMPOSED OF F. M. HARTLEY AND T. H. HARTLEY

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

INDEX

	Original	Print
Proceedings in supreme court of Oklahoma	1	1
Petition in error	1	1
Case-made from district court of Rogers County	5	3
Petition (omitted in printing)	11	
Præcipe for summons (" " ")	17	
Summons and return (" " ")	19	
Motion to require plaintiffs to make petition more definite and certain (omitted in printing)	23	
Order sustaining motion to make petition more definite and certain (omitted in printing)	26	
Amended petition	28	3
Answer to amended petition	33	5
Motion to declare court case (omitted in printing)	37	
Order declaring cause jury case (" " ")	39	
Reply to answer (" " ")	40	
Order setting cause (" " ")	40	
Amended reply	44	6
Minute entries of trial (omitted in printing)	47	
Statement of evidence	52	7
Caption (omitted in printing)	52	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 19, 1933

	Original	Print
Opening statement for plaintiffs (omitted in printing)	53	
Opening statement for defendant (omitted in printing)	61	
Testimony of Dow Rana	67	7
Testimony of T. H. Hartley	118	38
Defendant's Exhibit 1—Claim for loss	134	49
Plaintiffs' Exhibit "A"—Card acknowledging receipt of claim	152	60
Plaintiffs' Exhibit "B"—Letter from claim department, September 8, 1927	157	63
Testimony of Fred Sharp	163	66
T. H. Hartley (recalled)	171	71
Dow Rana (recalled)	174	73
Demurrer to plaintiffs' evidence	179	76
Defendant's Exhibit 2—Stipulation as to admission of livestock contract, etc	180	77
Defendant's Exhibit 3—Uniform livestock contract, May 4, 1927 (omitted in printing)	183	
Testimony of W. E. Taylor	197	79
Exhibit 1—Uniform livestock contract	204	83
Exhibits 2 to 4, inclusive—Uniform livestock contracts (omitted in printing)	222	
Exhibits 5 to 7, inclusive—Affidavits as to dipping (omitted in printing)	276	
Exhibit 8—Affidavit as to dipping	282	94
Testimony of W. M. Clayborne	284	95
W. E. Pearsall	289	98
Walter Bartlett	294	102
W. B. Mullins	304	108
W. L. Pfifer	309	111
Exhibit 1—Uniform livestock contract (omitted in printing)	311	
Testimony of F. C. Ashley	333	114
H. C. Ward	336	116
R. N. Galatian	339	118
Defendant's Exhibit 4—Delivery receipt	346	123
Defendant's Exhibit 5—Delivery receipt	348	124
Defendant's Exhibit 6—Delivery receipt	351	126
Defendant's Exhibit 7—Delivery receipt	354	128
Defendant's Exhibit 8—Delivery receipt	357	130
Testimony of Henry T. Mitchell	364	134
Defendant's motion for directed verdict	367	136
Testimony of T. H. Hartley (recalled)	368	137
Defendant's requested instructions	370	138
Instructions to jury	378	142
Verdict	394	151
Motion for new trial	396	151
Minute entry of continuance	400	153
Order overruling motion for new trial, etc	401	153
Journal entry of judgment	403	153

	Original	Print
Supersedeas bond on appeal.....(omitted in printing)..	407	
Recital as to case-made.....(" " ")..	410	
Reporter's certificate.....(" " ")..	411	
Clerk's certificate.....(" " ")..	412	
Certificate of attorneys.....(" " ")..	413	
Tender of case-made.....(" " ")..	414	
Acceptance of service.....(" " ")..	415	
Stipulation as to case-made....(" " ")..	416	
Notice of settlement of case-made (omitted in printing)	417	
Order settling case-made.....(omitted in printing)..	418	
Argument and submission.....(omitted in printing)..	419	
Judgment	420	155
Opinion, Riley, J.	421	156
Petition for rehearing	423	158
Order denying rehearing	425	160
Petition for stay of execution	426	160
Supplemental petition to stay mandate, etc	428	161
Order sustaining motion to stay mandate	431	163
Order staying judgment	432	164
Supersedeas bond on petition for certiorari (omitted in printing)	433	
Clerk's certificate.....(omitted in printing)..	435	
Stipulation as to printing record	436	165
Order extending time	438	166
Order allowing certiorari		167

[fols. a & 1] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 20751

MISSOURI PACIFIC RAILROAD COMPANY, a Corporation,
Plaintiff in Error,

vs.

HARTLEY BROTHERS, a Copartnership Composed of F. M. Hartley and T. H. Hartley, Defendants in Error

PETITION IN ERROR—Filed Sept. 25, 1929

The said Missouri Pacific Railroad Company, Plaintiff in Error, complains of said Defendants in Error, for that the said Hartley Brothers, a co-partnership composed of F. M. Hartley and T. H. Hartley, at the January 1929 Term of the District Court of Rogers County, State of Oklahoma, recovered a judgment, by the consideration of said Court, against the said Missouri Pacific Railroad Company, in a certain action then pending in said court, wherein the said Hartley Brothers, a co-partnership composed of F. M. Hartley and T. H. Hartley were *defendants* and the Missouri Pacific Railroad Company was defendant; the original case-made, duly certified and attested is hereunto attached, marked "Exhibit A", and made a part of this petition in error; and the said Missouri Pacific Railroad Company avers that there is error in the said record and proceedings, to-wit:

[fol. 2] First. That the verdict of the jury is contrary to law.

Second. That the verdict of the jury is contrary to the evidence.

Third. That the verdict of the jury is contrary to, and is not supported by either the law or the evidence.

Fourth. For errors occurring during the progress of the trial, which were excepted to at the time.

Fifth. The court erred in overruling the defendant's demurrer to plaintiffs' evidence at the time the plaintiffs rested their case.

Sixth. The court erred in overruling the defendant's motion for a directed verdict at the close of the evidence for both the plaintiff and defendant in the case.

Seventh. The court erred in overruling and denying the defendant's requested instruction Number 1, to which refusal the defendant excepted at the time.

Eighth. The court erred in refusing to give instruction Number 4 in the form and language in which said instruction was requested, and especially erred in giving upon his own motion or at the request of counsel for the plaintiff, the modification of the last paragraph thereof, to all of which the defendant excepted and caused its exceptions to be noted at the time.

Ninth. The court erred in giving, either upon its own motion or upon request of counsel for plaintiffs, instructions Numbers 4 and 5, the instruction Number 4 referred to, coming later in the instructions than the Number 4 requested by the defendant, to the giving of which the defendant at the time excepted and caused its exceptions to be noted of record.

[fols. 3-27] Tenth. The court erred in overruling the defendant's motion for a new trial, to which ruling of the court the defendant at the time excepted, and caused its exceptions to be noted of record.

Wherefore the Plaintiff in Error prays that said judgment so rendered may be reversed, set aside and held for naught and that a judgment may be rendered in favor of the plaintiff in error and against the defendants in error, upon the findings of fact returned by the jury, and that the plaintiff in error be restored to all rights that it has lost by the rendition of such judgment, and for such other relief as to the court may seem just.

Missouri Pacific Railroad Company, Plaintiff in Error, by W. L. Curtis, Its Attorney.

[fol. 28] IN DISTRICT COURT OF ROGERS COUNTY

No. 7709

HARTLEY BROTHERS, a Copartnership Composed of F. M. Hartley and T. H. Hartley, Plaintiffs,

vs.

MISSOURI-PACIFIC RAILROAD COMPANY, a Corporation, Defendants

AMENDED PETITION—Filed May 29, 1928

Comes now the plaintiffs above named and for their cause of action against the defendant above named allege and state:

That Hartley Brothers is a co-partnership composed of [fol. 29] F. M. Hartley and T. H. Hartley. That the defendant Missouri-Pacific Railroad Company, a corporation, is a corporation owning and operating a railroad in and through Rogers County, State of Oklahoma, and said corporation has an office and an agent located at Claremore, Rogers County, Oklahoma and is within the jurisdiction of this court.

That on or about the 4th day of May, 1927, the plaintiffs above named, through their agent and servant and employee, Dow Rana, delivered to the Rock Island Railroad Company ninety-two (92) head of cattle and to the A. D. & N. and Missouri-Pacific Railroad Company fifty-two (52) head of cattle and to the Missouri-Pacific Railroad Company 276 head of cattle to be shipped from the state of Arkansas to these plaintiffs at Blue Jacket, Oklahoma.

That thereafter and within a reasonable time from the date of shipment, but on a date not exactly known to these plaintiffs, all of said cattle so shipped as aforesaid, came into the possession of the Missouri-Pacific Railroad Company, a corporation, at Little Rock, Arkansas for shipment to Nowata, Oklahoma to these plaintiffs. That said cattle were delivered to the Missouri-Pacific Railroad Company in good condition, and the said Missouri-Pacific Railroad Company, a corporation, thereupon undertook to and agreed to deliver said cattle to these plaintiffs at Nowata, [fol. 30] Oklahoma, or any other point designated by these plaintiffs in the state of Oklahoma.

That thereafter and before said cattle were delivered these plaintiffs instructed said defendant railroad corpo-

ration, to deliver said cattle to these plaintiffs at Delaware, Nowata County, Oklahoma. That thereafter and on or about the 14th day of May, 1927, the defendant railroad, corporation, delivered said cattle to these plaintiffs at Delaware, Oklahoma and these plaintiffs thereupon paid to said railroad corporation, all money due to it as freight charges and other charges for the transportation and delivery of said cattle.

That the defendant railroad corporation was negligent and careless in the transportation of said cattle in that the train on which they were transported was jerked about and shunted to and fro in such a manner that the cattle were thrown from their feet onto the floors of the cars and were trampled upon by other cattle, and by reason of such rough handling and carelessness and negligence on the part of the said railroad corporation in transporting said cattle, the said cattle were bruised, skinned, maimed, lamed, and their bones broken and at the time said cattle were delivered to these plaintiffs at Delaware, Oklahoma and unloaded from said cars, 42 head of said cattle were dead and more than 50 head of said cattle were in such physical condition [fols. 31 & 32] that these plaintiffs were required to haul said cattle from said railroad cars to these plaintiffs' ranch and thereafter 50 head of said cattle died as a result of the injuries received while being transported by said railroad corporation as aforesaid. That the injuries to and death of said cattle were the direct and approximate result of the rough, negligent and careless manner in which said cattle were transported by said Missouri-Pacific Railroad Company, and not as a result of any act on the part of these plaintiffs.

That said 92 head of cattle were reasonable worth the sum of $2,760.00, and as a result of the death of said cattle, due to the rough, careless and negligent act of said railroad corporation, as aforesaid, these plaintiffs were damaged in the sum of $2,760.00.

Wherefore, the premises considered, the plaintiffs pray for judgment against the Missouri-Pacific Railroad Company, a corporation, defendant above named, for the sum of $2,760.00 with interest thereon from May 14, 1927 until paid, at the rate of 6% per annum and for the costs of said action.

Robson & Moreland, Attorneys for Plaintiff.

[fol. 33] IN DISTRICT COURT OF ROGERS COUNTY

[Title omitted]

ANSWER TO AMENDED PETITION—Filed June 14, 1928

Comes now the defendant, Missouri-Pacific Railroad Company, and for answer to plaintiffs' amended petition herein, states:

1

That it denies each and every material allegation in said [fol. 34] petition set out and contained.

2

That if the shipment of live stock moved over the railroad of the defendant, as alleged in said petition, that said live stock or cattle, and each and every car thereof, moved under a special live stock contract, which prior to the date of shipment had been filed with the Interstate Commerce Commission, and that under and by virtue of the provisions of said live stock contract, that said defendant did not assume any liability because of the inherent weakness and the poor, thin and weak condition of said cattle, and for injury to same resulting in the overcrowding of them in the cars, and resulting from the stoppage in transit for dipping, nor for the loss of life or injury of said cattle while upon the lines of the original connecting carrier, and that if said plaintiffs lost the number of said cattle as alleged in their petition, that said loss was directly the result of the poor, thin and weak condition of the cattle, and of the over-crowding of same in cars, and from the results of dipping said cattle immediately before shipment and at Little Rock in transit, and from loss occurring on original connecting carrier's line and prior to the delivery of said cattle to this defendant, all of which is especially plead as a bar to plaintiffs' right of recovery herein.

[fols. 35–43] The live stock contract hereinabove referred to, the duplicate originals of which were delivered to and should be in the possession of plaintiffs, provide among other things, "that before live stock is removed from the possession of the carrier or mingled with other live stock, the shipper, owner, consignee or agent thereof shall in-

form, in writing, the delivering carrier of any visible or manifest injury to the live stock"; and that no such written notice was given or served upon the defendant in connection with the several car loads of cattle upon which the plaintiffs' alleged cause of action is predicated, and especially as to the fifty head of cattle which it is alleged died after being removed to and placed upon pasture. And the above clause in the shipper's contract and in the tariffs governing the movement of such cattle is also especially plead as a bar to plaintiffs' right of recovery herein.

Wherefore, premises considered, defendant prays for an order and judgment of the court discharging it from any liability herein with its costs and all other proper relief.

Missouri Pacific Railroad Company, by W. L. Curtis, its Attorney.

[fol. 44] IN DISTRICT COURT OF ROGERS COUNTY

[Title omitted]

AMENDED REPLY—Filed Jan. 28, 1929

Come now the plaintiffs above named and with permission of the court first had and obtained file this their amended reply to the answer to amended petition of the defendant herein, and allege and state:

First

That they deny generally and specifically, each and every [fols. 45–51] allegation in said answer contained except such as may be hereinafter admitted, explained or qualified.

Second

They deny that they failed to give notice to the defendant herein of the injury to said cattle under and by virtue of the provisions of said live stock contract referred to in the answer, and in this connection further state that in the event they did fail to give such notice that the defendant, corporation, knew of the injured condition of said cattle and had an agent present at the time said cattle were un-

loaded at Delaware, Oklahoma, and had as full and complete knowledge of said injured condition of said cattle as these plaintiffs, and that no necessity existed for the giving of said notice. These plaintiffs state further that if they failed to give such notice, the failure to so do has been waived by the defendant by accepting a written claim thereafter on the part of these plaintiffs and considering the same and disallowing the same upon grounds other than the failure to give such notice as the defendant pleads is necessary to be given.

Wherefore, having fully replied to said answer, plaintiffs pray that they may have judgment in said cause according to their amended petition filed herein.

Robson & Moreland, Attorneys for Plaintiff.

[fols. 52–66] In District Court of Rogers County

[Title omitted]

Statement of Evidence

[fol. 67] (Thereupon the plaintiffs, in order to attempt to sustain the issues on their behalf, introduced the following witnesses and testimony, to wit:)

Plaintiffs' Testimony

Dow Rana, being called as the first witness on behalf of the Plaintiffs and having been previously duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Moreland:

Q. State your name to the court and jury.
A. Dow Rana.
Q. Where do you live, Mr. Rana?
A. Briggsville, Arkansas.
[fol. 68] Q. How long have you lived over in that country?
A. Twenty-four years.
Q. What business are you engaged in, Mr. Rana?
A. Buying and selling cattle.

Q. How long have you been engaged in that business?
A. Practically all my life.
Q. You were reared on the farm?
A. Yes, sir.
Q. And your father engaged in the business before you?
A. Yes, sir.
Q. How long have you been engaged in that business on your own hook?
A. About eleven years.
Q. How old are you at this time, Mr. Rana?
A. I was twenty-one when I went to buying for myself——
Q. You are thirty-two now?
A. Thirty-two now, yes, sir.
Q. Where have you been engaged in the cattle business?
A. Arkansas.
Q. In Arkansas?
A. Yes, sir.
Q. What part of Arkansas?
A. Well, from the western part to the southern part—all up and down the Rock Island—from where I live plumb [fol. 69] into nearly to the line of Louisiana.
Q. You buy and sell cattle, do you?
A. Yes, sir.
Q. And ship them out of Arkansas?
A. Yes, sir.
Q. And feed some of them yourself?
A. Yes, sir.
Q. Did you have occasion to buy some cattle at Malvern, Arkansas, in the spring of 1927?
A. Yes, sir.
Q. About what time of the year was this, Mr. Rana, that you bought these cattle?
A. About the first of May.
Q. About the first of May?
A. Yes, sir.
Q. How many cattle did you buy at Malvern?
A. About 300 to the best of my recollection.
Q. For whom were you buying these cattle?
A. Mr. Fred and Jot Hartley.
Q. The plaintiffs in this action?
A. Yes, sir.

Q. Now, where were these cattle with reference to Malvern when you bought them?

A. They were out west from the brick yards when I bought them.

Q. What was their condition at that time as to flesh?

A. They were in good condition at that time I bought [fol. 70] them.

Q. What grade of cattle was this, Mr. Rana?

A. Stocker cattle.

Q. Stocker cattle?

A. Yes, sir.

Q. Explain to the jury what you mean by "stocker" cattle.

A. Well, it is—what we call stocker cattle is cattle that people takes to the grass to let get fat and—and they were young cattle.

Q. Were all of these cattle what you call stocker cattle?

A. That is what I would call them.

Q. Yes.

A. Yes, sir.

Q. About what were their ages?

A. They was from one to five or six years old.

Q. From one to five or six years old?

A. Yes, sir.

Q. How many of the older cattle did you have in the bunch?

A. They were about half and half.

Q. About half and half?

A. Yes, sir.

Q. Average, well mixed cattle?

A. Well—average cattle—that is what I would call them.

[fol. 71] Q. What kind of care was given these cattle, at the time you bought them, with reference to feeding them?

A. Well, they were on the grass.

Q. On the grass?

A. Yes, sir.

Q. What part of the state of Arkansas is Malvern located?

A. South Arkansas.

Q. South Arkansas?

A. Yes, sir.

Q. They already had grass in that country down there at that time?

A. Yes, sir.

Q. And these cattle were on the grass?
A. Yes, sir.
Q. Do you know how long they had been on the grass at that time?
A. Well, they had been stalk field wintered—and they was there in the brick yards, and of course there was lots of farms was—inside where they ran—and they were running all back in the farms and on these meadows—the brickyards is a big meadows.
Q. They had been there all winter?
A. Yes, sir.
Q. Were these cattle in condition to ship at that time?
[fol. 72] A. Yes, sir.
Q. Were all of them in that condition that you bought?
A. Yes, sir.
Q. You didn't have to cut back any?
A. Well, I think I cut back about thirty head out of about 400.
Q. You didn't buy that thirty?
A. No, sir.
Q. And you didn't ship them in this bunch?
A. No, sir.
Q. The ones that you did buy and ship, you considered to be in shipping condition?
A. I sure did, yes, sir.
Q. Now, what arrangements did you make with reference to shipping the cattle from Malvern?
A. I don't understand just what you mean, Mr. Moreland.
Q. Did you make arrangements to ship them on the railroad?
A. Yes, sir, I ordered cars—ordered five cars.
Q. You ordered five cars?
A. Yes, sir.
Q. Did you take your cattle to the pens?
A. Yes, sir.
Q. Did they send you five cars?
A. Sent four.
Q. They sent four?

District Court, State of Oklahoma, Rogers County. Filed Jun. 21, 1929. Dyke Robinson, Court Clerk.

[fol. 73] A. Yes, sir.
Q. How far is Malvern from Little Rock?

A. About forty miles.

Q. About forty miles?

A. I don't know exactly the miles.

Q. Did you load these cattle, now, in the four cars and send them?

A. Yes, sir.

Q. You had ordered five, though, you say?

A. Yes, sir.

Q. Now, how long, as an average, would it take to run these cattle from Malvern to Little Rock?

A. In an hour and a half or two hours.

Q. Hour and a half to two hours? And that is on the main line of the Missouri Pacific south through the State, isn't it?

A. It is on the Missouri Pacific, but I can't tell you whether it is on the main line or not.

Q. What time of day did you load these cattle there at Malvern?

A. About sun-down.

Q. You loaded these on the Missouri Pacific?

A. Yes, sir.

Q. What time did these cattle get into Little Rock?

A. About three-thirty in the morning.

Q. About three-thirty in the morning?

A. Yes, sir.

[fol. 74] Q. When you loaded the cattle, were the cars standing there by themselves, or was the train there?

A. The train was there.

Q. The train was there?

A. Yes, sir.

Q. Now, when you loaded them, how long did they stand in Malvern before they left?

A. The train took them right on.

Q. Left right then?

A. Yes, sir.

Q. About sun-down?

A. Yes, sir, or maybe dusky dark.

Q. And it was forty miles to Little Rock?

A. Yes, sir.

Q. And they got there at three-thirty the next morning?

A. That is what they told me the next morning at Little Rock, when I went there to call for my cattle.

Q. What time did you get to Little Rock yourself?

A. About eight-thirty the next morning.
Q. Did you see these cattle there at that time?
A. Yes, sir.
Q. Where were they?
A. Stock pens.
Q. In the stock pens?
A. Yes, sir.
Q. What was their condition at that time, Mr. Rana?
[fol. 75] A. Well, I think they reported maybe about five or six dead—maybe ten head; and they were tromped up pretty bad—looked like they had been—several of them down in the night.
Q. Did you see any of these cattle that were reported dead?
A. Yes, sir.
Q. You examined them?
A. Yes, sir.
Q. What, in your opinion, was the cause of their death?

Mr. Curtis: We object to that as calling for a conclusion.
The Court: Objection sustained.
Mr. Robson: If this witness has handled those cattle all of his life, he has got a right to give that opinion. I think he has got a right to express his opinion as to the cause of the death of these cattle.

(Argument of counsel.)

Mr. Curtis: He can tell what he found in the examination, but——
The Court: The objection is sustained.
Mr. Robson: Exception.

By Mr. Moreland:

Q. What condition were these cattle in that were dead, with reference to their appearance?
A. They were bruised and tromped up quite a bit.
[fol. 76] Q. Now, did you see any there at that time that were not dead?
A. Yes, sir.
Q. About how many?
A. I think around six or seven—best of my recollection.
Q. What was their condition and appearance?
A. They were badly bruised and tromped.

Q. Now, do you know whether any of that batch died or not, that were injured when you got there?

A. I think part of them died; I don't recall the amount just exactly.

Q. I see. Now, did you buy some other cattle in south of Little Rock there?

A. At Leola—I bought two loads at Leola.

Q. Where were they delivered to you?

A. At Little Rock.

Q. At Little Rock? Now, did you buy any cattle after you got to Little Rock?

A. Yes, sir. I bought one load.

Q. Bought one load?

A. Yes, sir—shipped out of Ladelle.

Q. You say you bought one load at Little Rock?

A. Yes, sir.

Q. Now, that made seven loads, then, you had at Little Rock?

A. Yes, sir.

[fol. 77] Q. Is that correct?

A. Yes, sir.

Q. Now, what happened to the cattle when they got to Little Rock?

A. Out of these four loads at Malvern, there was three loads of them held under the dipping law there—what we call quarrantine.

Q. What went with the other load from Malvern?

A. I brought it on with that load I bought there in the stock pens at Little Rock—to Delaware, Oklahoma.

Q. That load that you bought at Little Rock had already passed the quarrantine?

A. Yes, sir.

Q. And one load that you brought from Malvern passed the quarrantine?

A. Yes, sir.

Q. And you brought those two loads on and delivered them at Delaware?

A. Yes, sir.

Q. And left five loads at Little Rock?

A. Yes, sir.

Q. Now, what did you do after you delivered these cattle at Delaware?

A. I went back to Little Rock where the other cattle was.

Q. Did anybody go with you?

[fol. 78] A. Mr. Jot Hartley.

Q. That is Mr. Hartley here (indicating)?

A. Yes, sir.

Q. Now, what did they do to these cattle that were held for quarrantine?

A. Put them over in——

Mr. Curtis: We object to the form of the question as to what "they" did, now.

The Court: Objection sustained.

Mr. Moreland: He (the witness) has testified as to who quarrantined them.

A. —Well; they put them over in some more pens there in Little Rock—they are just what they call the quarrantine pens—put them over there and held them there seven days.

By Mr. Moreland:

Q. What was done with the cattle in these seven days?

A. They were held there for dipping.

Q. Now, how many times were these cattle dipped?

A. They were dipped twice.

Q. When were they dipped the first time?

A. The morning they got in there.

Q. And when were they dipped the last time?

A. Seven days from that day.

Q. Seven days from that day?

A. Yes, sir.

Q. What care was given to these cattle while they were [fol. 79] held in quarrantine there in Little Rock?

A. The Government feeds them—they have to feed them three bales of prairie hay—of their hay; and I fed them three bales of alfalfa hay—to the load, extra, while they were held there.

Q. Per day?

A. Yes, sir.

Q. As I understand your testimony, you matched the regular ration of baled prairie hay with a bale of alfalfa hay for each bale of prairie hay? Is that correct?

A. Yes, sir.

Q. These particular cattle of yours, then, were, you might say, double fed there?

A. Yes, sir.

Q. You were there and saw them during this time?

A. Yes, sir.

Q. Did they lose in flesh or strength while they were held in the pens there at Little Rock?

A. I don't think so.

Q. You saw them, didn't you?

A. Yes, sir.

Q. Did you see them after they had been dipped the second time and were being loaded out to ship to Delaware?

A. Yes, sir, I was there when they was loaded.

Q. Were they in shipping condition at that time?

A. Yes, sir.

[fol. 80] Q. Had the vitality to stand that trip?

A. Yes, sir.

Q. Now, how many were loaded in the cars when you shipped them out of Little Rock—about the average per car?

A. About fifty-five——

Q. About fifty-five?

A. —Best I remember.

Q. What size cars were those?

A. Forty-foot cars.

Q. Forty-foot cars?

A. Yes, sir.

Q. Is that the largest size cattle-cars the railroads have?

A. The largest I could get, yes, sir.

Q. Now, were these cars over-crowded when they were shipped from Little Rock?

A. No, sir.

Q. Over what road did they leave Little Rock?

A. Missouri Pacific.

Q. What time in the day did they leave Little Rock?

A. In the afternoon—right—about nine o'clock, or ten—the best I remember.

Q. About nine or ten that night?

A. Yes, sir.

Q. How long had the cattle been loaded in the cars before they were shipped?

[fol. 81] A. Well, we loaded them and took them up to Levy—a little place up there they call Levy—and waited for the train to make up there.

Q. You left Little Rock, then, you think, about nine or ten o'clock with them that night?

A. Yes, sir.

Q. Now, where was the destination of that particular train?

A. We had them billed at Blue Jacket, but——

Q. I mean, how far was that particular crew going to bring the train?

A. I don't know.

Q. Well, where did the train stop?

A. Made up there—they picked us up at Levy.

Q. Then where did they drop you?

A. Van Buren.

Q. Van Buren?

A. Yes, sir.

Q. What time did you get to Van Buren, now?

A. In the morning some time.

Q. The next morning?

A. Yes, sir.

Q. Did you accompany these cattle from Little Rock to Van Buren?

A. Yes, sir.

Q. On this train?

A. Yes, sir.

[fol. 82] Q. About how many hours do you think you were making the trip?

A. I guess ten or eleven hours.

Q. Ten or eleven hours? Now, did you leave Van Buren immediately after you got there?

A. No, sir.

Q. What happened to these cars of cattle in Van Buren?

A. They were put on the switch yards there.

Q. Put on the switch yards?

A. Yes, sir.

Q. How long did they stay on the switch yard in Van Buren?

A. Well, I didn't have any watch, but I judge around two or three hours.

Q. Two or three hours? What was done with these particular cars while they were on the switch yard? How were they handled?

A. They were kept on the engine most of the time and in the train—and while they made up.

Q. On the train while they made up?

A. Yes, sir.

Q. Now, what was the manner and method in which these cars were handled and made up there in the Van Buren yard?

A. It looked awfully rough to me.

Q. Describe just what happened.

[fol. 83] A. Well, when we got to Van Buren, I went in the cars and I had two or three down and I had one dead, and I went in the cars and drug this one small yearling up in the corner and—got the balance of them up. Well, they hit the train all the time that I was in there—they—and taken me down in the lower end of the yards—I don't know where they taken me to; and they hit me pretty hard—knocked three or four more down, but I got them up before—after we got stopped, and I got out, and they grabbed them, directly, and run on down to another part of the yard—I don't know where—I was a stranger there—first time I was up there in the switch yards, and I couldn't hardly keep up with my cattle.

Q. Well, how were they handling these cars—when they were moving them that way?

A. They were just running into them—you know how they make up a train.

Q. Did they knock these cattle down when they were——

A. Yes, sir—they knocked about five down while I was there in the car with this load. I got one of the brakemen to get in there and help me get them up at one time, and we had to stop.

Q. Now, you say they stayed there on the switch yard for about two hours that day?

A. Two or three hours—I don't remember.

[fol. 84] Q. —while they were making up the train?

A. Yes, sir.

Q. Is it your experience, Mr. Rana, in shipping these cattle, that they keep the cattle cars on the switch engine when they are making up a train that way?

A. No, sir.

Q. What is the usual manner?

A. They usually send them out to one side, and when they get ready, the engine—they make up the cattle train without the cattle, and then they hook onto them when they are ready.

Q. They make up the train without them?

A. Yes, sir.

Q. Were these cattle handled in the manner that you have described all the time they were being switched about the yards there?

A. Most of the time they kept them—they kept them in the train all the time they were making it up. They never did set them out.

Q. And this rough treatment continued all during that time?

A. Yes, sir.

Q. Now, what time did you leave Van Buren?

A. About two o'clock, to the best of my recollection.

Q. About two o'clock?

A. Yes, sir.

[fol. 85] Q. Now, do you know, are you familiar, or are you acquainted with the names of the various towns between Van Burean and Delaware?

A. No, sir, I am not.

Q. Did you make any stops on that run between Van Buren and Delaware?

A. Several.

Q. How many?

A. Well, I well remember Wagoner.

Q. Wagoner?

A. Yes, sir, for one. I don't know any other towns—many towns along there.

Q. In what manner was the train handled between Van Buren and Delaware?

A. Well, in these stops it was jammed around quite a bit—what I would call it.

Q. And cattle knocked off of their feet——

A. Yes, sir.

Q. —and down in the car?

A. Yes, sir.

Q. What would you do at these various stops?

A. Until dark I would go in there and get the cattle up, and part of the time rode with them—went from one car to the other while the train was running.

Q. They were knocked down in all of these cars, were they?

A. Yes, sir.

[fol. 86] Mr. Curtis: We object to that as leading the witness.

The Court: It probably is leading the witness; but the objection is overruled.

Mr. Curtis: Exception.

By Mr. Moreland:

Q. What was the condition of these cattle at each one of these stops with reference to being on their feet or on the floor?

A. They were down—most of them.

Q. Most of them down? Now, how much or how long did that continue during this trip from Van Buren to Delaware?

A. Continued all—until it got dark, and when it got dark I went to the caboose and went to bed—laid down.

Q. Were they on the floor at that time?

A. Yes, sir, quite a few of them.

Q. Quite a few of them on the floor?

A. Yes, sir.

Q. Now, what time did you get to Delaware?

A. Two o'clock in the morning, or something like that.

Q. About two o'clock in the morning?

A. Yes, sir.

Q. Who was at the station when you got there?

[fol. 87] A. Mr. Hartley and a couple of his hired hands.

Q. Which Hartley?

A. Mr. Jot Hartley.

Q. The one sitting here (indicating)?

A. Yes, sir.

Q. And who else?

A. Couple of his hands—Parks, and I don't know the other boy's name.

Q. Now, was the station agent there at that time?

A. They went and got him.

Q. They went and got him?

A. Yes, sir.

Q. Do you know his name?

A. No, sir.

Q. Have you seen him here this morning?

A. Yes, sir.

Q. Now, what was the condition of these cattle when—did you unload them right there at Delaware at that time?

A. Yes, sir.

Q. Did the train drop the cars, or did it just stop long enough for you to unload?

A. They stopped just long enough for us to unload—I couldn't say—whether we used pinch-bars or whether they spotted them for us—I disremember——

Q. They left the cars there, did they?

A. Yes, sir.

[fol. 88] Q. Now, what was the condition of these cattle at the time you got to Delaware and started to unload them?

A. They were—eleven or twelve dead, and there was about twenty we had to just drag out of the cars.

Q. Drag out of the cars?

A. Yes, sir.

Q. Were they on the floor or not?

A. Yes, sir.

Q. What was the condition of the other cattle?

A. They were bruised.

Q. Now, you unloaded them into the pens there?

A. Yes, sir.

Q. Was the railroad agent there at the time you unloaded them?

A. The man they went and got was there—I don't know the agent.

Q. Well, he was the man that you have seen here this morning?

A. Yes, sir.

Q. Did he see these cattle?

A. Yes, sir.

Q. Did he see the dead cattle?

A. Yes, sir.

Q. Did he see the cattle that were on the floor?

A. Yes, sir.

Q. Now, was he the man that unlocked the doors for you [fol. 89] and let you unload the cattle?

A. Yes, sir.

Q. And told you where to put them?

A. Yes, sir.

Q. Did he make any statement there at that time with reference to these cattle?

A. He said the worst bruised——

Mr. Curtis: Wait a minute; we object to that question.

Mr. Moreland: It is a part of the res gestæ, if the court please; a statement on the part of the agent of this company when they were unloading the cattle.

The Court: Objection overruled. Is he here?

Mr. Moreland: He is here.

The Court: Objection overruled.

Mr. Curtis: The defendant excepts, and we object as to any alleged statement of any alleged agent or representative of the defendant, which he might have made at the time of the delivery or unloading of these cattle, as being incompetent, irrelevant and immaterial and not constituting any proper item of evidence or proof tending to prove or disprove any of the issues in this case.

The Court: Objection overruled.

Mr. Curtis: The defendant excepts.

[fol. 90] The Court: It would be admissible only as a circumstance.

Mr. Curtis: It is our contention that, based upon the pleadings here, they must rely upon the negligence and the charge of rough handling, and that any statement of anybody, which would have a tendency to draw a conclusion or comparison as between the condition of these cattle and any other car of cattle, would not be competent or proper testimony to go to the jury.

(Argument of counsel.)

The Court: Objection sustained. I do not think it is applicable here, because that is after the alleged injury had been done.

Mr. Robson: Give us an exception. We want to make an offer. We offer to show by the witness now on the stand that, at the time the cattle were unloaded, the agent of the Missouri Pacific Railroad Company at Delaware, Oklahoma, made the statement that the same were the worst bunch of bruised, mangled cattle that he ever saw. (Addressing witness:) If you were permitted to testify——

The Witness: Yes, sir.

Mr. Robson: —would you testify to that fact?

The Witness: Yes, sir.

The Court: Do you object to that?

Mr. Curtis: Yes, I object to the offer.

[fol. 91] The Court: The objection is sustained.

Mr. Robson: Exception.

By Mr. Moreland:

Q. Did you move these cattle right on out of the pens at that time?

A. Next morning.

Q. Next morning?

A. Yes, sir.

Q. After daylight?

A. After daylight, yes, sir.

Q. Were you there when they were moved?

A. Yes, sir.

Q. What was the condition of the cattle in the pens when you went there to move them?

Mr. Curtis: That is objected to as being incompetent, irrelevant and immaterial and as being subsequent to the date of the delivery of the cattle, as shown by the testimony of this witness.

The Court: Objection overruled.

Mr. Curtis: The defendant excepts.

By Mr. Moreland:

Q. Go ahead and answer.

A. Go ahead and answer?

Q. Did you understand the question?

The Court: Read the question, Mr. Reporter.

[fol. 92] (Question was read as follows:)

Q. What was the condition of the cattle in the pens when you went there to move them?

Mr. Moreland: Wait just a minute; kill that question; I will withdraw it.

By Mr. Moreland:

Q. Were the pens locked when you got there with the train that night to unload these cattle?

A. Yes, sir.

Q. And the agent unlocked the pens?

A. The next morning.

Q. Well——

A. That night? Yes, sir.

Q. Let you load them in there?

A. Yes, sir.

Q. And then he locked the pens up?

A. Yes, sir.

Q. And who kept the key?

A. He did.

Q. And then you came down there the next morning, after daylight, after the cattle?

A. We stayed right there that night with them.

Q. Stayed right there, with them locked up in the pen?

A. Yes, sir.

Q. Did he come down there any more?

[fol. 93] A. Next morning.

Q. What time the next morning? After daylight?

A. About sun-up, I suppose.

Q. What did he do when he got there?

A. He unlocked the pens, and what of them that was able to be driven, we drove out, and Mr. Hartley told him that he wouldn't take out these other cattle that was bruised up so bad, and he aimed to leave quite a few of them, and he asked Mr. Hartley to take them on and do the best he could with them.

Q. The agent did?

A. Yes, sir.

Q. What was the condition of these cattle that Mr. Hartley was going to refuse to move?

A. They were almost tramped to death, and a lot of them couldn't walk—we hauled them out to Mr. Fred Sharp's place in a truck—most of them.

Q. The cattle that you had taken out of the cars dead were still there?

A. Yes, sir.

Q. And the ones you had to drag out of the cars were still there——

A. Yes, sir.

Q. —and on the ground?

A. Yes, sir.

Q. About how many of these cattle were there that were on the ground and couldn't get up?

[fol. 94] A. About twenty-five, I suppose.

Q. About twenty-five?

A. Yes, sir.

Q. How did you get those out to Fred Sharp's there?

A. Hauled them in a truck.

Q. How far is Sharp's place from the station there at Delaware?

A. That was my first time out there—I judged it around four or five miles.

Q. Around four or five miles?

A. Yes, sir.

Q. Now, what was the condition of these cattle that were dead and those that were injured and had to be hauled out in the truck, as compared to those which were able to walk and be driven out there, in flesh and general condition?

A. They were an average of the cattle.

Q. They were an average of the cattle?

A. Yes, sir.

Q. Now, how long did you stay with these cattle after they were moved to Fred Sharp's place?

A. About five or six days.

Q. About five or six days?

A. About five or six days, yes, sir.

Q. What about these cattle that were hauled out to Fred Sharp's place—what happened to them?

[fol. 95] A. They died that night and the next morning—they was all dead that night and the next evening about one o'clock.

Q. You said there was about twenty-five of those cattle?

A. Yes, sir.

Q. Now, did any more of these cattle die after that?

A. Yes, sir, I think we checked up about fifty head there—in the next three or four days—or five.

Q. Before you left?

A. Before I left, yes, sir.

Q. You saw these cattle, did you?

A. Yes, sir.

Q. All of this time?

A. I—yes, sir.

Q. What was their physical condition with reference to these injuries?

A. Well, they had swollen places on them, and tramped up, and so sore they couldn't get up. I helped lots of them up—me and Fred Sharp—and we tried to get them to walk around and get used to their selves. They seemed to be more-or-less paralyzed.

Q. Now, which of the cattle was it that died after you moved them out there—the ones that were injured, or the ones that were able to be driven?

A. All of the injured cattle that were hauled out there [fol. 96] died the next morning—that night and the next morning.

Q. And those others that died, then, between the time that you moved them out there and the time that you left: were they the injured cattle?

A. They were the next worst bruised up cattle that we had in the cars.

Q. These cattle that died after you moved them out to Fred Sharp's place: what was their condition as to flesh and strength, as compared to the ones that lived?

A. They were as good an average cattle as the others.

Mr. Moreland: That is all.

The Court: Gentlemen of the jury, you will be permitted to recess, under the usual admonition of the Court not to discuss the case or any subject connected with it, among yourselves or with anybody else, and not to form or express an opinion until you have heard all of the evidence, the instructions of the Court and the argument of counsel. I am giving this admonition at this time, gentlemen, and it will apply to any case in which you are serving on the jury. Of course, it is not proper for you to discuss the case or permit anybody else to discuss it with you. You will be permitted to take a short recess.

(Thereupon a short recess was taken, after which Court duly reconvened, with all the jury present, the parties and attorneys in this cause present, all court officials present, [fol. 97] and the same witness, Dow Rana, being on the witness-stand for cross-examination; and thereupon the following proceedings were had, to-wit:)

Cross-examination.

By Mr. Curtis:

Q. Mr. Rana, you say you bought about 400 head of cattle around Malvern there prior to——

A. Yes, sir.

Q. —this shipment?

A. Yes, sir.

Q. Had somebody else bunched them, or did you gather them up around the country there yourself?

A. I bought them from—the Malvern cattle—from two different men, Mr. Fisher and Mr. Henry.

Q. Mr. Fisher and Mr. Henry had gathered them up around the farmers and had brought them in here to this——

A. They had wintered these cattle—most of them—themselves.

Q. They bunched them, then, during the fall of 1926?

A. Yes, sir.

Q. Fall and winter of 1926?

A. Yes, sir, fall and winter—I don't know where they got them, myself.

Q. You don't know where they got them, except they [fol. 98] were cattle native to that particular section of the country there, were they not?

A. Yes, sir.

Q. And they had been wintered by turning them into the stalk fields and old fields around there?

Mr. Robson: We object to that. It is not a question of how they had been wintered. It is a question of condition.

The Court: Overruled.

(Question was read as follows:)

Q. And they had been wintered by turning them into the stalk fields and old fields around there?

By Mr. Curtis:

Q. You may answer the question.

A. It was overruled, was it?

Q. That means you must answer the question.

The Court: Go ahead and answer the question.

A. Well, I don't know how they—where they had let these cattle run, until I went down there and bought them. I don't know whether they ran in old fields or not—but they were in the brick yards there, in some stalk fields there, when I bought them.

Q. You bought them, then, just immediately before you shipped them?

A. About fifteen days.

Q. About fifteen days?

[fol. 99] A. Yes, sir.

Q. After you bought these cattle, did you leave them in the lot around the brick plant there?

A. I drove them out of the brick yards to the stock pens.

Q. And you held them there those fifteen days in the stock pens?

A. No, sir.

Q. You said you held them about fifteen days? What did you do with them after you put them in the stock pens?

A. I shipped them to Little Rock.

Q. How long after you bought them?

A. About fifteen days after I bought them, but they stayed there and was dipped there and put back in this brick yard after I bought them—I didn't receive them for about fifteen days after I bought them.

Q. They were back at Malvern before you shipped them out, then?

A. Yes, sir.

Q. Who took care of them during that fifteen days?

A. Mr. Henry and Mr. Fisher—you see, they had this brick plant—these meadows and pastures—they had it leased and rented, and they let them just run there just like they had been letting them run there.

Q. How many acres were included in the brick plant property?

[fol. 100] A. I guess a couple of thousand, perhaps—with the farming land and all.

Q. Well, I am talking about the pasture part of it.

A. Well, about a couple of thousand acres.

Q. Farming land and all?

A. Yes, sir, but it is all joining.

Q. How much of it are they farming?

A. Well, they are farming in on the creeks there, I guess—I guess—well, of course, I don't know—but I would think about a third or half of it; and the rest of it is in meadow; they mow it every year—cut hay off of it.

Q. They were not fed anything after you bought them, except what they could gather on the range there—on the pasture?

A. The grass was about eight or ten inches high when I bought them—green grass.

Q. You don't know anything about where these cattle came from, except they were native to that part of the country down there?

A. I don't know where they came from, no, sir.

Q. That is a rather flat country around there, generally?

A. Yes, sir.

Q. Some swamp land?

A. Yes, sir.

Q. And the stocker cattle run out during the winter in [fol. 101] the fields and pasture?—there aren't any sheds for them?

A. No, sir.

Q. Now, when you did ship these cattle, do you remember how many cattle you loaded in each one of the cars that went out from Malvern?

A. Yes, sir.

Q. How many?

A. Loaded sixty-three in one car; six-one, I think, in one car——

Q. A little louder——

A. There was sixty-three, sixty-one; eighty-four or 'five in one car; and eighty-three in another.

Q. You didn't accompany them there, those that went out from Malvern into Little Rock in that train that night?

A. No, sir, I had to stay there and settle up—do some settling with some parties.

Q. Now, I believe you stated that after you got to Little Rock you bought a car of cattle that had come in there from down at Ladelle?

A. Yes, sir.

Q. That was already in the yard?

A. Yes, sir.

Q. Bought that car-load in the yard at Little Rock?

A. Yes, sir.

Q. And that that particular car—the Ladelle car—and [fol. 102] one of the Malvern cars——

A. Yes, sir.

Q. —Came on through?

A. Yes, sir.

Q. Then this car of dipped cattle that was dipped a sufficient number of times at Malvern—before you loaded them out—was that a part of the entire bunch?

A. Yes, sir, they was all dipped at the same time, and they didn't have—they didn't have ticks on them.

Q. And did they sort them, before you loaded them out at Malvern, from the rest of the herd?

A. No, sir, I just got so many cattle out of the herd and put in the car; and when that car come through it passed the inspection, and the others didn't.

Q. Did you select them with the idea of taking only certain ones in that car-load?

A. I took them as I came to them. I think the car that I brought on had eighty-five in it, and I just cut them out—I had all of these cattle in the same pen and I just cut out so many, and they came on through.

Q. When did these cars of cattle that came off of the Rock Island from Leola reach Little Rock for unloading, with reference to the time the Malvern cattle came in?

A. The day before the Malvern cattle—we loaded them one day about twelve o'clock, and we went on to Malvern, and the next evening we loaded the Malvern cattle.

[fol. 103] Q. You were not up at Little Rock when the Leola cattle, off of the Rock Island, were unloaded there?

A. No, sir.

Q. You were present, though, when they were loaded down at Leola——

A. Yes, sir.

Q. —And signed shipper's contract?

A. Yes, sir.

Q. You didn't follow that shipment through from Leola through to Little Rock?

A. No, sir.

Q. Now, when these cattle reached Little Rock, I will ask you if they were not turned over to the government there?

A. Yes, sir.

Q. The railroad turned them over to the government?

A. Yes, sir.

Q. And they were kept, then, by the government until they were disinfected to the satisfaction of the inspector in charge?

A. They were kept there seven days.

Q. Do you remember the inspector's name?

A. Yes, sir.

Q. What was it?

A. Mr. Denman.

Q. Mr. Denman?

A. Yes, sir.

[fol. 104] Q. And when he certified that they were clear of ticks, then you loaded them on out?

A. Yes, sir.

Q. How many cattle was there that you lost or that died there in the dipping pens or wherever you kept them there, from the time this shipment reached Little Rock until you loaded them out?

A. I think we checked out seventeen short, the best I remember.

Q. Well, they died there, didn't they?

A. There was about five dead when these Malvern cattle got there, and about seven—never did get up, and they died before they got in the pens—never was dipped.

Q. Well, after they were unloaded and after the first dipping, I will ask you if you didn't lose around seventeen head before you got them loaded again?

A. (Witness hesitates.) Probably seventeen—I don't remember.

Q. How many deads were there and how many cripples were there in these two cars off of the Rock Island when they got in there?

A. One.

Q. One dead and one crippled? or one——

A. One crippled cow was all.

Q. I will ask you if you recall how many cattle did you load in each one of the cars from Leola over the Rock [fol. 105] Island?

A. Fifty-three and forty.

Q. I will ask you if those cattle were range cattle, or stockers, as you call them—cattle picked up around without reference to the sex or age or condition, but that were bought up around the neighborhood there?

A. I bought them from Mr. Phillips and Mr. Butler, and they were cattle dealers there, and they were about the same type of cattle as I bought up at Malvern.

Q. I will ask you if the contracts don't show, on the face, which you signed there, that in one of the cars there were exceptions as to ten on account of being thin and weak and probably unable to be shipped, and if in the other one there were not exceptions as to eight of them being weak?

A. In which cars?

Q. In the Rock Island cars.

A. In the Leola cars—yes, sir.

Q. Now, did you mix these cattle and co-mingle them after you got them in the dipping yards?

A. No, sir, they don't allow you to do that. Every car is held separate.

Q. They have a separate pen?

A. Yes, sir.

Q. And were these cattle kept separately as they came in, that is, each car in a separate stall or place from the time [fol. 106] you got them to Little Rock until you got through dipping and shipped them out of there?

A. Yes, sir.

Q. And do you recall how many of these cattle that you lost—the dead ones—came out of the Leola shipment?

A. I don't remember exactly—that amount—we had—just one cow that died. She seemed to be paralyzed—the best cow that was——

Q. A pretty good, heavy cow, and in pretty good flesh?

A. She was a fine cow, yes.

Q. That was in the Rock Island car?

A. Yes, sir.

Q. You didn't know how she got hurt there, did you?

A. No, sir, I didn't know how come it, no, sir.

Q. You don't know how many others in those two cars might have been injured at the same time?

A. About two or three, I think, was all the dead ones in the Leola. I don't remember whether there was over two or three or not—I don't remember.

Q. Now, you rode the train on the two first cars that came on out?

A. Yes, sir.

Q. Was there any dead ones in either one of those cars when you reached Delaware?

A. We had one that was down and afterwards died, but it wasn't dead when it got to Delaware.

[fol. 107] Q. And did any of them die after you got them out on the pasture?

A. No, sir.

Q. When you unloaded them, you took them over to the company stock pens and away from the government pens and over to the railroad company's pens at Levy, didn't you, to load them?

A. No.

Q. Where did you load them at Little Rock, with reference to the quarantine pens?

A. In what they call the clean pens—they call them dirty pens and clean pens. There is just a big wall between them. And that is all the difference there in the——

Q. What was it you said in your direct examination about making the train there somewhere to load these cattle?

A. When these cattle were loaded there in Little Rock, the switch engine carried them over to Levy, and the train was made up and they were picked up there at Levy.

Q. They were loaded at the——

A. At the Iron Mountain stock pens in North Little Rock.

Q. And the switch engine moved them over to Levy and put them in the siding there?

A. Yes, sir, I rode the front end of the engine with the [fol. 108] men there——

Q. Now, there was five cars in that shipment, wasn't there?

A. Yes, sir.

Q. I will ask you if the cattle cars were not set in the front, immediately back of the engine?

A. Yes, sir.

Q. Do you know the reason for stock cars being hauled immediately back of the engine on these freight trains?

A. Yes, sir.

Q. What is the purpose of placing them up there?

A. They claim that they don't—jerk them and—the train don't jerk them as bad there. That is what they claim.

Q. In stopping or starting, then, the slack of the train is not so great——

A. Yes, sir.

Q. —closer to the engine as it is father back?

A. Yes, sir, that is what I understand about it.

Q. Isn't it true that they put them in the same location on the train out of Van Buren when they put them out of there?

A. Yes, sir.

Q. Now, when this train got into Van Buren, of course, they stopped on the main line down there in the yard?

A. Well, I don't know whether it was the main yard [fol. 109] or not.

Q. They stopped on the regular track that they went into the yards on, any way?

A. Yes, sir.

Q. And the regular engine got loose?

A. Yes, sir—the best I remember. I can't answer that question exactly.

Q. And then the switch engine picked these cars up and worked them into another train?

A. Yes, sir.

Q. And then the engine that came out on the road picked up the train and went on out?

A. They kept these cattle on the engine while they were making up the train.

Q. Well, they had to be taken off of the train they went in there on?

A. They were set over on the side and——

Q. Yes.

A. —and then switched into another train.

Q. Wasn't they taken out of the train when they went into the Van Buren yards—weren't they taken out of the yard and then switched into a different train that came on out into Oklahoma?

A. Well, there was quite a bit of switching; I never paid any attention; I was paying no attention to nothing except my cattle.

Q. You had a different train crew in Van Buren, Mr. [fol. 110] Rana——

A. Yes, sir.

Q. —from the one that you went in there with?

A. Yes, sir.

Q. And I will ask you if you didn't stop at Greenwood Junction—the first stop out of Van Burean—and take out a dead one?

A. Out of the car?

Q. Yes.

A. No, sir.

Q. Where did you take out the first dead one?

A. Delaware, Oklahoma.

Q. You got them through until you got to Delaware?

A. Yes, sir.

Q. As I recall, you stated in the direct examination that these dead ones at Little Rock, that were in the pens there, were stamped and bruised. I want you to explain to the jury how you know they were stamped and bruised. Did you take the hide off of them and examine them, or did you

just reach that conclusion by looking at them in their normal condition?

A. Well, they were—about five dead ones, and about seven that was—couldn't walk and never did get to the stock pens—never did go through the dipping vat.

Q. Well, you stated to the jury they were tramped on and bruised. I want you to explain to them how you know [fol. 111] they were tramped on and bruised.

A. Well, the hide was tromped off of them—not the hide, but the hair—you could tell that they had been tromped and—they were—had the—well, I pronounced them bruised up and tromped up cattle. That is the best that I can tell you.

Q. They had been dipped down there at Malvern?

A. Yes, sir.

Q. Tick-infected cattle—range cattle?

A. Yes, sir.

Q. They had been dipped down there——

A. Yes, sir.

Q. —before they had been moved over to the government pens at Little Rock?

A. Yes, sir.

Q. I will ask you if sometimes your mixture on your dip doesn't have a tendency, where the mixture is not properly made, to affect cattle—especially thin range cattle?

Mr. Robson: We object to that as improper cross-examination. It was not brought out on direct examination; and it is a part of their defense.

The Court: Objection sustained.

Mr. Curtis: I desire an exception.

By Mr. Curtis:

Q. Did you have any interest in these cattle after they were started off on the shipment?

[fol. 112] A. Yes, sir.

Q. When did your interest in them cease?

A. What do you mean?

Q. Your ownership in them—your interest in them.

A. When did it start or begin——

Q. No, when did it stop?

Mr. Robson (addressing witness): When did Mr. Hartley settle up with you and you had no interest in the cattle?

The Witness: When I got them to Centralia, Oklahoma.

By Mr. Curtis:

Q. Which?

A. When I got them to Centralia, Oklahoma.

Q. That is out from——

A. Delaware.

Q. Out from Delaware?

A. Yes, sir.

Q. And what was the occasion of your staying out there four or five days after the cattle was taken out from Delaware out to the pasture?

A. He needed a hand, and I felt like that I could be worth something to stay out there and help him with them and help him onto the ranch with them—that was my——

Q. Did he have some cow men out there that helped move them up there and helped take charge of them?

[fol. 113] A. He had a couple of boys up there.

Q. And you went on and stayed there four or five days because he wanted you to?

A. Sir?

Q. I say, you are a cattle man and you just went out and stayed with them four or five days because he needed you?

A. No, sir, I—I went out there because that I was—I hadn't got the cattle to where I had started, and I was supposed to help him get these cattle to Centralia.

Q. Now, did you sell them to him delivered at Centralia, or did you sell them to him delivered down at Malvern, or Little Rock?

A. Mr. Hartley paid me—I went down and bought the cattle, and he paid me for them.

Q. Down at Little Rock?

A. Down at Malvern—I don't know all of those places.

Q. Down at Malvern?

A. I don't know all of those places—yes, sir.

Q. But you agreed, in connection with the sale, to help him get out to Oklahoma with them?

A. Yes, sir.

Q. Now, you say when they were unloaded there at Delaware, there was so many dead ones and so many downs that were tramped and bruised. How did you find out [fol. 114] that the ones that you claim were down were tramped and bruised there?

A. Well, I was on the train when they were doing it, and I rode in these cars part of the time and tried to keep these cattle up—coming on from Van Buren—after we left Van Buren.

Q. They didn't make many stops after they left Van Buren until they got to Delaware, did they?

A. Yes, sir, they made several stops. They stopped about an hour and waited for something—I don't know for what.

Q. Stopped along at the water tank and got water for their engine, too, I guess, didn't they?

A. Well, I never paid any attention to what they stopped for. I was busy most of the time.

Q. Busy until you went to bed?

A. I didn't go to bed until dark.

Q. Until dark? Well, what time did you leave Van Buren?

A. Near three o'clock, the best I remember.

Q. And got over to Delaware what time in the morning?

A. Two o'clock in the morning.

Mr. Curtis: That is all.

Redirect examination.

By Mr. Moreland:

[fol. 115] Q. You say the country where you bought these cattle was south of Little Rock?

A. Yes, sir.

Q. You say that at the time you got them, they had them in a brick yard down there?

A. Yes, sir.

Q. What size was this brick yard?

A. Must have been a couple of thousand acres in it.

Q. I see. Was this country—this land including the brick yard—stripped and the dirt taken out, or what was its condition?

A. No, sir, the way they get that dirt there—and brick—they make these brick in Malvern—they just go down there

and dig a hole and haul it out on a little bitty, narrow railroad like a coal mine engine; and they mow most of it—mow most of it for meadows. They lease this brick yard and they mow it for meadows and work some of it in corn.

Q. And run cattle on there practically all the time?

A. Yes, sir.

Q. What time of the year does the grass come out down there, Mr. Rana?

A. Well, I went down there about the—I guess around the 20th of April, and the grass was coming through pretty good at that time—was getting up to where cattle was [fol. 116] grazing right along on it.

Q. Well, how old would you say the grass was?

A. Well, "hit" was up about that high (indicating) whenever I taken the cattle off of it.

Q. Well, was it mature grass, such that it had strength in it—feed for cattle?

A. It was just spring grass—just——

Q. Green?

A. Yes, sir.

Q. Now, you say one of these cars that you loaded at Malvern had eighty-five cattle in it?

A. Yes, sir.

Q. Was it the one that passed the inspection, now, at Little Rock and came on through with the Ladelle?

A. Yes, sir.

Q. And was there any cattle dead in it when you got to Delaware, or was the cow dead in the Ladelle shipment?

A. Had—in that Malvern car there was one calf—it wasn't dead, but we—it did die after we got there, but it wasn't dead when the train got there, but it did die a few hours after we got there.

Q. That is the two cars that you shipped through first?

A. Yes, sir.

Q. Did you load these cattle at Malvern?

[fol. 117] A. Yes, sir.

Q. Who was present?

A. Sam Henry and a couple of his boys—Sam, Junior—and Tom Fisher, Dean Hardy, and old man Taylor—the depot agent—helped me count the cattle in the cars.

Q. That is the Missouri Pacific agent at Malvern?

A. Mr. Taylor.

Q. He helped you count them in?

A. Yes, sir.

Q. Did he object to the number of cattle that went in these cars?

A. No, sir.

Q. Did he object to their condition as not being fit to ship?

A. No, sir.

Q. Did he make any statement about the condition——

A. No, sir.

Q. Did he make any notation on his shipper's contracts there that these cattle were not fit to ship?

A. No, sir—never had that done but one place, and that was at Leola.

Q. And those cattle came through all right?

A. Yes, sir.

Q. You don't have any interest in these cattle now?

A. No, sir.

Q. You settled with Mr. Hartley at Centralia?

A. Yes, sir.

[fol. 118] Mr. Moreland: That is all.

Mr. Curtis: That is all.

(Witness excused.)

T. H. Hartley, one of the plaintiffs, being called as the next witness on behalf of the plaintiffs and being first duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Moreland:

Q. State your name to the court and jury.

A. T. H. Hartley.

Q. Where do you live, Mr. Hartley?

A. Live at Grove, Oklahoma.

Q. Grove, Oklahoma? You are a member of the partnership of Hartley Brothers?

A. Yes, sir.

Q. Your brother, Fred Hartley, is associated with you in that partnership?

A. Yes, sir.

Q. What business does this partnership engage in?

A. Well, the stock business.
Q. Stock business?
A. Feeding——
Q. Where?
A. At Centralia.
[fol. 119] Q. Now, there have been some statements made here with reference to "Jot" Hartley. Is that——
A. Nic-name.
Q. Is that yourself?
A. Yes, sir.
Q. Is that your nic-name?
A. Yes, sir.
Q. "Jot" Hartley?
A. Yes, sir.
Q. How old are you, Mr. Hartley?
A. Twenty-five.
Q. Where were you reared?
A. Well, most of my life in Missouri.
Q. What business was your father in?
A. He was a farmer——
Q. —Stock business?
A. Stock business.
Q. You lived there on the farm——
A. Yes, sir.
Q. —Until you came to Oklahoma?
A. Yes, sir.
Q. How long have you been engaged in the stock business?
A. About four years.
Q. That is, for yourself?
A. Yes, sir—and my partner.
Q. How much experience have you had with stock?
[fol. 120] A. Well, I have been around stock and handled stock all my life.
Q. Now, you heard Mr. Rana's testimony with reference to the cattle which were purchased in Arkansas in the latter part of April and the first of May of 1927 for you and your brother?
A. Yes, sir.
Q. When did you first see these cattle, Mr. Hartley?
A. Well, the first cattle that I saw was the two loads that came up——

Q. What condition were those two loads of cattle in when they got to Delaware?

A. Well, they were in good condition.

Q. Shipping condition?

A. Yes, sir.

Q. And were any of them injured or hurt or dead?

A. Well, there was one down in the car.

Q. One down in the car? Now, as to the other cattle: when did you see them first?

A. I saw them in Little Rock.

Q. In Little Rock?

A. About two or three days after these others got in.

Q. Now, where were they in Little Rock when you saw them the first time?

A. They were in the quarrantine pens.

Q. What was the condition of these cattle at that time, [fol. 121] Mr. Hartley, with reference to flesh and strength and just their general physical condition?

A. Well—for that time of the year—stocker cattle—about the same as the ones that came up first.

Q. About the same as the ones that came up there first? From your observation of those cattle and your experience with cattle, would you say they were in fit condition to ship?

A. Yes, sir.

Q. They had sufficient vitality to stand a railroad trip of the kind that they were taking?

A. Yes, sir.

Q. Had these cattle been dipped when you got down there?

A. Yes, sir, they had been dipped once at Little Rock.

Q. Now, did you stay until the cattle were shipped out?

A. No, sir.

Q. How long did you stay at Little Rock.

A. I was there about three days.

Q. You came on back? Now, when did you see these cattle next?

A. Saw them at Delaware when they were unloaded.

Q. The day they were unloaded? How many cars were unloaded there at Delaware that last time?

A. Five.

[fol. 122] Q. Who came up with these cattle from Little Rock to Delaware?

A. Mr. Rana.

Q. About what time did these cattle get to Delaware that day?

A. Well, it was about two o'clock in the morning.

Q. Were you waiting there for them?

A. Yes, sir.

Q. Who was there with you?

A. There was a couple of boys I had working for me—Parks and Thompson.

Q. Now, was the Missouri Pacific Agent there at that time?

A. No, sir, I sent this Parks boy after him. He took my car——

Q. And were the pens unlocked at the time you got there or when these cattle got there?

A. Well, the outside gates were locked.

Q. The outside gates were locked? Now, was the agent there when these cattle were unloaded?

A. Yes, sir.

Q. And he saw them unloaded?

A. Yes, sir.

Q. Now, Mr. Hartley, I wish you would explain to the jury the condition in which these cattle were when they reached Delaware.

A. Well, when these cattle got to Delaware, it was dark, [fol. 123] of course, and you couldn't tell just how many was down, but just to look at them, it looked like probably half of them were down—tromped. And we unloaded them—some of them we didn't get out then—we dragged a number of them out and tailed a part of them up.

Q. What do you mean by "tailing" them up?

A. Well, just get their tail and tail them up.

Q. Lift them up?

A. Lift them up.

Q. Were any of them dead?

A. Yes, there was eleven or twelve.

Q. Eleven or twelve dead? Now, these cattle that you tailed up: were those cattle able to get out of the cars by themselves?

A. Well, some of them could, and some of them had laid there and they were cold and numb. It didn't look like the cars—of course the cars had been padded, but they didn't look like it and the manure was deep there and they had

laid on that wet manure until they were cold and numb and stiff and could hardly walk.

Q. Now, you unloaded from the cars into the pens, did you?

A. Yes, sir.

Q. Did you move them right out of the pen then?

A. No, sir.

Q. How long did they stay in the pens after they were loaded out of the cars?

[fol. 124] A. Well, they stayed there until the next morning.

Q. Could you have gotten them out of the pens at that time, while they were there, or were the pens locked?

A. No, the pens were locked. We had to go and get the agent the next morning.

Q. I see. He had the key?

A. Yes, sir.

Q. You stayed there with them that night, though, after they were unloaded?

A. Yes, sir.

Q. Now, what was the condition of these cattle when you started to move them from there the next morning?

A. Well, there was about—part of them cattle, I didn't want to receive them.

Q. Why?

A. Some of them couldn't walk, and we left them. I told the agent that I wouldn't move them out of the yards—wasn't going to receive them at all. So he insisted on me taking them out—that he would make a report of it and the condition that these cattle were in when they were unloaded. And so we got a truck and hauled these cattle, that wasn't able to get up, out to this feller Sharp's pasture. Of course, there was some of them couldn't even get up. Some of them could get up and couldn't walk.

Q. You left the dead cattle there at the pen?

[fol. 125] A. Yes, sir, we left them in the cars.

Q. Now, these cattle that were dead there in the cars when they were unloaded: what was their condition in comparison with the cattle that were able to get out of the car by themselves, as to flesh and strength and general appearance?

A. Well, about the same—there was—about an average.

Q. About an average? Now, these cattle that were down in the cars and tramped on and injured—those that were unable to get out by themselves and you had to haul to Fred Sharp's pasture—what was their condition with reference to the others?

A. Well, they were bruised.

Q. Well, as compared to the other cattle.

A. Well, about the same—about the same flesh.

Q. Well, similar ages and grades?

A. Yes, sir.

Q. What was the nature of the injuries that these cattle had, that you had to haul and that were down in the car?

A. Well, some of them were crippled; some of them were peeled up——

Q. What do you mean by "peeled up," now?

A. Well, by—like laying down in the car and wet on one side all over, and had been tromped on the other side and the hair was off of them.

Q. Was their hide cut?

A. Well, just bruised like—not cut or bleeding or any- [fol. 126] thing like that, but they were just bruised, and some of them were swollen.

Q. These cattle that were moved down to Fred Sharp's pasture in a truck: what happened to them?

A. They all died.

Q. When did they die?

A. Well, they died that day and that night and the next day.

Q. Now, did any more of the cattle that were moved to Fred Sharp's pasture die, besides the ones that were hauled out there?

A. Yes, sir.

Q. About how many, would you say?

A. Well, as well as I remember, there was about sixty.

Q. Including the ones that were hauled out, or excluding the ones that were hauled out?

A. Including the ones that were hauled out.

Q. Including the ones that were hauled out? How many did you haul out? Do you recall?

A. Well, there was somewhere between twenty and twenty-five. Now, there was two or three of these cattle that died at Delaware, that weren't included in the dead

cattle down on the Fred Sharp place——

Q. I see.

A. —That died there in the pens at Delaware.

Q. Before you could move them out of the pens?

A. Yes, sir.

[fol. 127] Q. How many cattle did you lose all together, Mr. Hartley, when you finally got them to your place?

A. Well, from the time these cattle were loaded in Arkansas, why, there was ninety-two head of them.

Q. These cattle died—did these cattle die as a result of the injuries that they received in transit?

Mr. Curtis: We object to that as calling for a conclusion.

The Court: Objection sustained.

Mr. Robson: Exception.

By Mr. Moreland:

Q. Mr. Hartley, what was the value of these cattle?

A. About $30 a head.

Q. About $30 a head? I believe you said there was ninety-two cattle finally that died?

A. Yes, sir.

Q. You saw these cattle—that were dead and died up there around the place?

A. Yes, sir.

Q. From your observation of these cattle that were dead and your experience in handling stock, what would you say was the cause of the death of these cattle?

Mr. Curtis: We object to that as calling for a conclusion.

The Court: Objection sustained.

Mr. Robson: Exception.

By Mr. Moreland:

Q. What was the condition of these cattle that died on [fol. 128] Fred Sharp's place there? That is, what type of injuries did they have?

A. Well, they were all injured about the same.

Q. What kind of injuries?

A. Well, of course those that were crippled—some of them were crippled in the hind leg, and some of them had a lame front leg, and some of them with both legs lame.

Mr. Moreland: That is all.

Cross-examination.

By Mr. Curtis:

Q. You say the cars were not bedded for these cattle?

A. Well, I wouldn't say whether they were bedded or not, but they looked as though they hadn't been bedded. The manure was deep and it was—wet in there.

Q. Do you think the condition of these cattle could be chargeable to the lack of bedding?

A. Well—I couldn't say whether the cars were bedded or not, but it looked like they had just loaded in wet cars. Of course I wasn't there when they were loaded.

Q. Well, you were there when they were unloaded, weren't you?

A. I was there when they were unloaded.

[fol. 129] Q. Was there any bedding in the cars?

A. Well, yes, there was bedding in there. I don't know how long it had been in there.

Q. Now, you say you examined some of these that were dead and some of these that afterwards died? Did you examine the skin? You say it looked swollen, and hair off of it, like it had been bruised?

A. No—of course, where cattle are tramped, they are just —knock the hair off of the hide. Well, when they step down on a cow they will make—at that time of the year the hair is loose on cattle, and there just may be peeled a little of the hair off of it.

Q. How much experience have you had in the dipping of cattle?

A. I haven't had a great deal—some.

Q. Do you know what effect an improper mixture has on cattle—an improper mixture that burns them?

Mr. Moreland: We object to that as improper cross-examination and incompetent, irrelevant and immaterial.

(Argument of counsel.)

The Court: Objection overruled; I will let the witness answer.

Mr. Moreland: Exception.

By Mr. Curtis:

Q. Answer the question.

A. What little experience I have seen—had—in the dip-

[fol. 130] ping of cattle—well, you take cattle where they

are dipped under government supervision, the dip is generally mixed so that there is no danger of burning the cattle.

Q. You heard the testimony of Mr. Rana, though, didn't you, that these cattle had all been dipped——

A. Yes, sir.

Q. —Down at Malvern—that is, four cars of them?

A. Yes, sir.

Q. You don't know anything about who supervised that dipping?

A. I couldn't tell you.

Q. Then, what effect, from your observation, would an improper dip—a dip sufficiently strong to burn the skin of the animal—have on the appearance of the animal and on the hair?

A. Well, you mean how they would look after they are burned?

Q. Yes.

A. Well, when cattle are burned in dip, they crack open just like a blister—more like a blister than anything else.

Q. Does it make the hair slip?

A. Well, the hide and hair all slips.

Q. Now, take that condition and then have them on a wet bedding, as you have suggested, or put them on a bed that becomes damp and wet by the cattle being on there—[fol. 131] wouldn't that make their sides look wet and sloppy to a greater or larger extent than if they had not been dipped or burned?

Mr. Robson: We object to all of this——

(Argument of counsel.)

Mr. Curtis: I didn't mean to ask for an opinion. I am asking for a fact.

The Court: Objection overruled.

Mr. Robson: Exception.

(The question was read as follows:)

Q. Now, take that condition and then have them on a wet bedding, as you have suggested, or put them on a bed that becomes damp and wet by the cattle being on there—wouldn't that make their sides look wet and sloppy to a greater or larger extent than if they had not been dipped or burned?

Mr. Robson: That is objected to as calling for a conclusion of the witness.

The Court: In that form it would probably call for a conclusion; but objection overruled; I will let the witness answer if he knows.

Mr. Robson: Exception.

A. Well, I don't know as it would. Of course, if they were just dipped and then loaded right up, it might have a tendency—but these cattle were not down in the cars until after—to amount to anything until after they left Van Buren—or in Van Buren.

[fol. 132] By Mr. Curtis:

Q. How do you know?

A. Well——

Q. You were not along, were you?

A. I wasn't along.

Q. No. Then you are just making that statement from hearsay?

A. Yes, sir.

Mr. Curtis: We ask that the answer be stricken and the jury instructed not to consider it.

The Court: Motion sustained. Anything that anybody might have told this witness would not be admissible.

By Mr. Curtis:

Q. Now, do you recall the date that those five cars of cattle reached Delaware?

A. The 14th, I believe, as well as I remember.

Q. Of what month?

A. May, 1927.

Q. I will ask you if you did not thereafter, under the date of June 30th, 1927, or something like six weeks later, put in a claim for forty-six head of these cattle and send it in to the claim department of the Missouri Pacific Railroad Company?

A. Well, I don't remember the date, but this claim was put in—but this agent—he checked——

Q. Never mind.

[fol. 133] Mr. Moreland: I insist the witness has got a right to explain the claim if he wants to, if the Court please.

Mr. Curtis: He hasn't at this time.

Mr. Robson: Further, we object as improper cross-examination.

The Court: Objection overruled.

Mr. Robson: Exception.

Mr. Moreland: He has got a right to explain the claim.

The Court: Well, I will let you bring that out on re-direct examination.

Mr. Curtis: He can explain later, but I am not asking for his explanation at this time.

By Mr. Curtis:

Q. I ask you if this (indicating) is the claim that you sent in?

A. (Witness examines paper shown to him.) Yes, sir.

Mr. Curtis: We now desire to offer this claim in evidence and have it marked (handing the Reporter the paper referred to) as Defendant's Exhibit "1" for the purpose of identification.

(The paper handed to reporter was marked as the Defendant's Exhibit "1" for identification, as requested.)

Mr. Robson: We object to it as incompetent, irrelevant and immaterial, and not proper at this time and not proper [fol. 134] cross-examination. It is a part of Mr. Curtis' defense.

The Court: I will let you identify it.

Mr. Curtis: It is admissible to show that a claim was not filed and sent in until June 30th after the delivery of the cattle, as he says, about May 14th, and that in the claim (indicating) he only sets up a claim for forty-six head of cattle and fixes the value of them at $24 per head, whereas he is claiming in his testimony here for ninety-two head at approximately $30 a head.

The Court: Objection overruled. I will let Defendant's Exhibit "1" be admitted.

Mr. Robson: Exception.

Mr. Curtis: We have offered it, and it is admitted in evidence?

The Court: Yes, it is admitted.

Mr. Robson: Exception.

(Said Defendant's Exhibit "1", introduced in evidence herein, is, together with all notations and endorsements thereon, in the words and figures following, to-wit:)

DEFENDANT'S EXHIBIT "1"

Form 5178—9, '23—20M.
Missouri Pacific.

Missouri Pacific Railroad Co.

[fol. 135] Standard Form for Presentation of Loss and Damage Claims

Approved by the Interstate Commerce Commission, The Freight Claim Association, National Industrial Traffic League, The National Association of Railway Commissioners.

(Stamped:) Mo. Pac. R. R. Co., Delaware, Okla., Jun. 30, 1927.

(Name of person to whom claim is presented:) Mr. E. G. Popkess.

(Claimant's Number:)* One.

(Name of carrier:) G. L. S. A.

(Address:) Kansas City, Mo.

(Address of claimant:) Centralia, Okla.

(Carrier's Number:) —.

(Date:) June 30th, 1927.

This claim for (amount of claim) $1,104.00 is made against the carrier named above by (name of claimant) Hartley Brothers, (loss or damage) loss in connection with the following described shipments:

Description of shipment: 6 cars cattle.

Name and address of consignor (shipper): Various. See detail statement.

Shipped from (city, town or station): See detail statement.

[fol. 136] To (city, town or station): ——.

Final Destination (city, town or station): Delaware, Okla.

Routed via ——.

Bill of Lading issued by: See statement Co.; Date of Bill of Lading: May 4th, 1927.

---

*Claimant should assign to each claim a number, inserting same in the space provided at the upper right hand corner of this form. Reference should be made thereto in all correspondence pertaining to this claim.

E 89452

Paid Freight Bill (Pro.) Number—see statement. Original Car Number and Initial: ——

Name and address of consignee (whom shipped to): Dow Rana, Riggsville, Ark.

If shipment reconsigned enroute, state particulars: R/C at Little Rock, Ark., to Delaware, Okla. Original destn. Blue Jacket, Okla.

Detailed Statement Showing How Amount Claimed Is Determined

(Number and Description of Articles, Nature and Extent of Loss or Damage, Invoice Price of Articles, Amount of Claim, etc.)

Total number head billed from Malvern and Leola, Ark.	374
Total number received from Malvern and Leola, Ark.	328
Total number short	46 head
46 head cost $24 head, including freight	$1,104.00
Total amount claimed	$1,104.00

[fol. 137] In addition to the information given above, the following documents are submitted in support of this claim.**

Copy—

(X) 1. Original bill of lading, if not previously surrendered to carrier.

(X) 2. Original paid freight ("expense") bill.

(X) 3. Original invoice or certified copy.

**Claimant will please place check (x) before such of the documents mentioned as have been attached, and explain under "Remarks" the absence of any of the documents called for in connection with this claim. When for any reason it is impossible for claimant to produce original bill of lading, or paid freight bill, claimant should indemnify [fol. 138] carrier or carriers against duplicate claim supported by original documents.

(X) 4. Other particulars obtainable in proof of loss or damage claimed:

Paid drafts attached, showing costs.

Remarks: Contracts surrendered for drovers' return transportation and can be secured from passenger traffic department Mo. Pac. R. R. Co.

The foregoing statement of facts is hereby certified to as correct.

(Signed) (Signature of Claimant) Hartley Bros., by T. H. Hartley.

(On the back of said claim exhibit appears the following printed matter:)

To claimants:

Persons presenting claims to a carrier will expedite settlement by furnishing the carrier with a complete and detailed statement of all pertinent facts tending to establish the validity of their claims. It is the desire of carriers to settle promptly all valid claims, and the frank and hearty cooperation of the claimant is therefore solicited. Delayed settlement of claims is frequently due to the failure of the claimant to furnish carrier with the necessary information and documents with which to make investigation and establish liability promptly. It should be borne in mind that carriers under the terms of the Act to Regulate Commerce are required to thoroughly investigate each claim before payment. Claimants should therefore, in every case furnish the carrier, as far as possible, with the information and documents called for on the other side of this form, even though there may be instances when it appears to the claimant that the information called for is more than necessary to establish the validity of the claim. There are [fol. 139] claims, e. g., for concealed loss and damage, in connection with which it may be necessary to call for additional information from the claimant before making settlement.

Claimants are requested to make use of this form for filing claims with carriers. Claims may be filed with the carrier's agent either at the point of origin or destination of shipment, or direct with the Claim Department of the carrier, and will be considered properly presented only when the infomation and documents called for on the other side of this form have, as far as possible, been supplied.

Claimants should read carefully the information appearing below.

Important Information to Claimants Respecting Loss and Damage Claims

Before presenting a claim on account of loss and damage, the following important information respecting claims should be given careful consideration:

1. The terms under which property is accepted and transported by a carrier are stated on the bill of lading issued by the carrier; also in tariffs and classifications issued or subscribed to by the carrier. Persons intending to file claims should, before doing so, examine the terms and conditions under which property was accepted and transported. Careful consideration should also be given to the law and [fol. 140] rulings of the Federal Government and regulations of carriers relative to the marking, packing and other conditions governing the transportation of explosives and other dangerous articles.

2. Carriers and their agents are bound by the provisions of law, and any deviation therefrom by the payment of claims before the facts and measure of legal liability are established will render them, as well as the claimant, liable to the fines and penalties by law. Attention is called to the following extract from Interstate Commerce Commission Conference Ruling No. 68:

"It is not the proper practice for railroad companies to adjust claims immediately on presentation and without investigation. The fact that shippers may give bond to secure repayment in case, upon subsequent examination, the claims prove to have been improperly adjusted, does not justify the practice."

3. In order that the carrier may have the opportunity to inspect goods and thereby properly verify claims, any loss or damage discovered after delivery should be reported to the agent of the delivering line, as far as possible, immediately upon discovery, or within forty-eight hours after receipt of goods by consignee.

4. Pending the settlement of any dispute or disagreement between the consignee and the carrier as to questions

of loss and damage in connection with property trans-
[fol. 141] ported, the consignee may avoid a possible accrual of demurrage or storage charges, as well as other loss or damage, by promptly accepting the property from the carrier. Such action on his part in no way affects any valid claim which may exist against the carrier.

5. Under the provisions of the 6th section of the Act to Regulate Commerce, it is unlawful for a carrier to charge or demand or collect or receive, any greater or less or different compensation for the transportation of property than the rates and charges named in tariffs lawfully on file, nor to refund or remit in any manner or by any device any portion of the rates and charges so specified. The refund or remission of any portion of the rates and charges so specified through the payment of fraudulent, fictitious or excessive claims for loss of or damage to merchandise transported is as much a violation of the law as is a direct concession or departure from the published rates and charges.

In this connection, attention is also called to the following important quotation from section 10 of the Act to Regulate Commerce:

"Any common carrier subject to the provisions of this Act or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of
[fol. 142] weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense."

"Any person, corporation, or company, or any agent or officer thereof, who shall deliver property for transportation to any common carrier subject to the provisions of this Act, or for whom, as consignor or consignee, any such car-

rier shall transport property, who shall knowingly and wilfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement, or by any other device or means, [fol. 143] whether with or without the consent or connivance of the carrier, its agent or officer, obtain or attempt to obtain transportation for such property at less than the regular rates then established and in force on the line of transportation; or who shall knowingly and wilfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false statement or representation as to cost, value, nature, or extent of injury, or by the use of any false bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit or deposition; knowing the same to be false, fictitious, or fraudulent, or to contain any false, fictitious, or fraudulent statement or entry, obtain or attempt to obtain any allowance refund, or payment for damage or otherwise in connection with or growing out of the transportation of or agreement to transport such property, whether with or without the consent or connivance of the carrier, whereby the compensation of such carrier for such transportation, either before or after payment, shall in fact be made less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction, within the dis- [fol. 144] trict in which such offense was wholly or in part committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the *directions* of the court: Provided, That the penalty of imprisonment shall not apply to artificial persons."

(Defendant's Exhibit "1" concluded.)

Mr. Curtis: That is all for this witness.

Redirect examination (of T. H. Hartley).

By Mr. Moreland:

Q. To whom did you present this claim when you made it out?

A. Well, the Agent at Delaware.

Q. At Delaware? What is his name?

A. Bob Galatian, I believe—something like that.

Q. Was he the same agent who was there that night and [fol. 145] saw these cattle unloaded——

A. Yes, sir.

Q. —And helped to unload them?

A. Yes, sir.

Q. Did he make any statement to you there that night at the time these cattle were unloaded concerning their condition?

A. Yes, sir.

Q. Will you state to the jury what that statement was?

Mr. Curtis: We desire to object to the question for the reason suggested a while ago, with the other witness, that any statement that might have been made or might not have been made by Mr. Galatian, or some agent or anybody else, would not be competent to prove or disprove any of the allegations of negligence set out in the petition.

The Court: Objection sustained. I think I ruled on that a while ago.

Mr. Moreland: Exception.

Mr. Moreland: That is all.

(Witness excused.)

The Court: Gentlemen of the jury, it is now twelve o'clock, and you will be permitted to recess until 1:15 o'clock, under the usual admonition of the Court not to discuss the case or any subject connected with it, and not per- [fol. 146] mit anybody else to do so, either with you or in your presence; and be back at one-fifteen this afternoon. Don't permit any one to discuss this case with you or in your presence; and don't form or express any opinion until after you have heard all of the evidence, the Instructions from the Court, and the argument of counsel.

(Thereupon Court duly adjourned for the noon hour and until 1:15 o'clock P. M., at which time it duly reconvened with all court officials present, the jury all present, and the parties and attorneys in this cause present as before, and thereupon the trial proceeded further, as follows:)

T. H. HARTLEY, being recalled as a witness on behalf of the plaintiffs and having been previously duly sworn, testified further as follows, to-wit:

Direct examination.

By Mr. Moreland:

Q. You are the same Mr. Hartley that was on the stand before noon?

A. Yes, sir.

Q. I believe you identified the instrument which is marked Defendant's Exhibit "1" (indicating) as a written claim which you filed with the defendant in this case for the loss of these cattle?

[fol. 147] A. Yes, sir.

Q. And this claim (indicating) appears to be dated and received June 30, 1927. Now, Mr. Hartley, had you attempted to make a claim on this loss before that time?

A. No—yes, we had, just after the cattle got in, and the reason this claim hadn't been made out before was that the agent wanted the contracts to these cattle.

Q. Which agent is that, now?

A. At Delaware.

Q. The Missouri Pacific agent——

A. Yes, sir.

Q. —Wanted the livestock contracts?

A. He wrote the railroad company—the agent—that handled these Ladelle cattle, for their contract—you see, these contracts were used in going back.

Q. Yes.

A. And then he wrote——

Mr. Curtis (addressing witness): You mean your caretaker used them?

The Witness: Yes, sir, as he went back; he went back—he rode one of these contracts back when he went back to Arkansas.

By Mr. Moreland:

Q. Used it for a pass on the road?

A. Yes, sir.

[fol. 148] Q. Then you did go in later, on the 30th of June, and make this claim? Is that right?

A. Yes, sir.

Q. Mr. Curtis called your attention to the fact this morning that this claim reads for forty-six head of cattle lost, at $24 per head. What explanation do you make for this claim having been made for forty-six cattle at $24 a head?

A. Well, when the agent made the claim out——

Q. That is, the agent at Delaware?

A. Yes, sir—he insisted on making it out for just the cattle that was dead while they was in their possession—say nothing about the crippled cattle that we unloaded and took out—and I told him that if they would look after this claim and settle it right away, why, I was willing to take part of the loss.

Q. Did he make any statement or representation to you at that time with reference to the manner in which this claim would be handled if it were made out for forty-six head of cattle rather than all that you had lost?

A. He made the remark that he thought that the claim would be settled right away and there would be no doubt but what it would be paid in full right away after he made his report on the loss of these other cattle.

Q. Did he make any remarks or representations to you there at that time as to what was likely to happen if you [fol. 149] insisted on filing the claim for the full amount?

Mr. Curtis: I believe I will object to a further pursuit of that line of investigation, as being incompetent, irrelevant and immaterial, and not tending to prove or disprove any of the issues in this case, and as not tending to establish any liability.

The Court: Objection overruled; in so far as it pertains to the proof of notice, I think it would be admissible: not as an admission. I will instruct the Jury that this line of testimony would not be competent for the purpose of establishing a liability of the railroad company to this plaintiff. It would only be admissible in so far as it pertains to the failure to give the written notice as provided for in the contract.

Mr. Curtis: The defendant excepts.

By Mr. Moreland:

Q. Do you remember the question now, or do you want it asked again?

A. Ask it again.

Q. Did the agent at that time make any statements or representations to you as to what would likely—what attitude the railroad company would take toward the claim if it were presented for the full number of cattle lost, rather than for a reduced number?

Mr. Curtis: We want to renew our objections.

[fol. 150] The Court: I make the same ruling.

Mr. Curtis: And the defendant excepts.

By Mr. Moreland:

Q. Do you understand the question?

A. The objection was overruled?

Q. Yes; you can answer it.

A. Well, he just made the statement that they wouldn't—that it was hard to get them to pay a claim any way; and when he made this claim out, he checked up what was short from the time these cattle were loaded to the end of the designation. That wasn't counting the cattle that were hauled out and that died later on.

Q. Was that his count of what was dead at that time?

A. That was his check of the cattle.

Q. Did he say what attitude would be taken toward the claim if it was made out for the full number of cattle that you claimed?

Mr. Curtis: We want to object to that question as being incompetent, irrelevant and immaterial and as amounting to an attempt to vary the written conditions and provisions of the contract under which these cattle were transported.

The Court: Objection overruled.

Mr. Curtis: The defendant excepts.

By Mr. Moreland:

Q. Go ahead.

A. Answer the question?

[fol. 151] Q. Yes.

A. Well, he advised me to put in this claim for this amount of cattle and to try to avoid a lawsuit and—he—

seemed to think that they would pay this claim, and advised me not to put it in—put in for any more.

Q. Did he say you would likely have a lawsuit if you would put it in for the full amount?

A. Well, I don't remember—he—it—he made the remark that, if we put it in for the full amount, that they sure wouldn't pay it, and the chances was that, if we put it in for that—just those other cattle that had died—why, they would pay it.

Q. Then, I understand your testimony to be, Mr. Hartley, that on the agent's advice this claim (indicating) was made out and sent in for forty-six head, to get prompt action and to avoid a probable lawsuit? Is that correct?

A. Yes, sir.

Q. Now, who prepared the claim?

A. The agent.

Q. Agent——

A. At Delaware.

Q. You signed it——

A. Yes, sir.

Q. —And understood what was in it?

A. Yes, sir.

Q. And understood the reason for making it? Now, did the company ever acknowledge receipt of this claim?

[fol. 152] A. Yes, sir.

Mr. Moreland: I would like to have this (indicating and handing a paper to reporter) marked as Plaintiffs' Exhibit "A."

(The instrument handed to reporter was marked as requested.)

Mr. Moreland: We would like to offer in evidence Plaintiffs' Exhibit "A."

Mr. Curtis: No objection.

The Court: All right; it will be admitted.

(Said Plaintiffs' Exhibit "A," introduced in evidence, is, together with all endorsements and notations thereon, in the words and figures following, to-wit:)

PLAINTIFFS' EXHIBIT "A"

Post Card

R. R. B. (Cancelled 2¢ postage stamp.)
Register or insure valuable mail.
St. Louis, Mo., Jul. 9, 6 P. M., 1927.

Missouri Pacific Railroad Co.

St. Louis, Mo., Jul. 7, 1927.

Hartley Brothers, Centralia, Okla.:

[fol. 153] This will acknowledge receipt of your claim recorded under Claim Number E89452-26; your Number 1. L. & D. M. Amount, 1,104.00.

R. B. Williamson, Freight Claim Agent.

Form 2419.

(Plaintiffs' Exhibit "A" concluded.)

By Mr. Moreland:

Q. I will hand you an instrument marked Plaintiffs' Exhibit "A" (handing same to witness), and ask you to state what that is.

A. Which? This card (indicating)?

Q. Yes.

A. Well, it is an acknowledgment of the claim that was put in.

Q. You received that how?

A. By mail.

Q. By mail in the regular course of business?

A. Yes, sir.

Q. Now, after this claim had been presented, did you hear from the company after you had received their acknowledgment of the claim?

[fol. 154] A. Yes, sir.

Mr. Moreland: We ask to have this (indicating and handing paper to reporter) marked as Plaintiffs' Exhibit "B."

(The paper handed to reporter was marked as Plaintiffs' Exhibit "B," as requested.)

Mr. Moreland: We would like to offer in evidence the instrument marked Plaintiffs' Exhibit "B."

(Said exhibit last referred to was handed to and examined by counsel for defendant.)

Mr. Curtis: I am willing to admit all of the letter, except this part of it here (indicating).

The Court: Do you want to make an objection to it?

Mr. Curtis: I want to object to that part of the letter that is contained in the last paragraph of it (indicating). The rest of it, I think, is proper, under the plaintiffs' theory of the case.

(The said exhibit in question was handed to and examined by the Court.)

The Court: I think you could probably read all except the last paragraph.

Mr. Curtis: Yes.

The Court. It will be admitted, all except the last paragraph, and you may read all of it except the last paragraph; or you can probably stipulate, if you want to, that the railroad company wrote that part of it which is introduced, [fol. 155] excepting the last paragraph, which would not be admissible.

Mr. Curtis: That is a letter from the general freight claim agent.

The Court: Yes.

Mr. Curtis: And I think it would all be admissible except that last paragraph.

The Court: Yes, I will permit you to read all except that last paragraph, as having been written by the official designated on the letterhead.

Mr. Moreland: We will withdraw the offer at this time.

The Court: All right.

By Mr. Moreland:

Q. This claim that you sent to the railroad company, was it accepted or declined?

A. The claim?

Q. Yes.

A. It was accepted.

Q. Well, was it allowed?

A. No.

Q. Did they refuse to pay it?

A. Yes, sir.

Q. Did they give any reason for refusing to pay it?
A. Well——

Mr. Curtis: We object to that because the letter itself is the best evidence.
[fol. 156] The Court: Objection sustained.
Mr. Moreland: Well, they have offered to pay a part of it. Now, if he (Mr. Curtis) wants to lay it on that ground, we have got a right to show, then, why they refused.
The Court: Oh, I don't know. Anything in the nature of a compromise would not be admissible.

By Mr. Moreland:

Q. Did the company ever advise you that the claim was not presented in time?
A. No, they never did advise me that way—that I remember of.
Q. The correspondence that you got—the refusal to pay the claim that you got was in the form of a letter, was it?
A. Yes, sir.
Q. Is this letter which has been marked Plaintiffs' Exhibit "B" (indicating) that letter?
A. Yes, sir.
Q. What were the reasons given in the letter for the refusal?

Mr. Curtis: We object to that, as the letter itself is the best evidence.
The Court: Objection sustained.
Mr. Moreland: Let's see; I believe that I withdrew my offer a while ago of the letter, didn't I?
The Court: Yes.
[fol. 157] Mr. Moreland: I want to re-offer the Plaintiffs' Exhibit "B", the letter, in evidence at this time.
The Court: It will be admitted. Of course, the last paragraph there (indicating) is incompetent. I will permit you to read all of it except the last paragraph.
Mr. Moreland: Give us an exception to the ruling.

(Said Plaintiffs' Exhibit "B" was thereupon introduced and read in evidence in its entirety, with the exception of the last paragraph thereof; and, inasmuch as plaintiffs excepted to the Court's refusal to admit the entire letter as an exhibit in evidence, said Plaintiffs' Exhibit "B", for the

sake of the record, is hereinafter copied and set out both ways, that is to say, both as introduced and as offered by plaintiffs, to-wit:)

PLAINTIFFS' EXHIBIT "B" (AS INTRODUCED AND READ)

Form 6179.
3 27 10M.
Missouri Pacific Lines.

Missouri Pacific Railroad Company, Freight Claim Department, 1224 Railway Exchange Building, St. Louis, Mo.

[fol. 158] R. B. Williamson, Freight Claim Agent. H. V. Cooper, Asst. Freight Claim Agent

Claim E-89452-26

St. Louis, Mo., Sept. 8, 1927.

Hartley Brothers, Centralia, Okla.

GENTLEMEN: With reference to your bill of June 30, 1927, amount $1,104.00, would state that we have investigated the handling of these various shipments and cannot find any evidence of negligence on the part of the carriers. Our records show that upon arrival at North Little Rock, there were dead in the car, five animal- and there were eight animals down, which died in the pen and that there were 25 cattle died in the pens, between dippings. There were 12 dead upon arrival at destination. This would make total of 45 head. We note your claim is based for 46 head.

The billing covers but 425 head and is the number accounted for, so that the actual difference at destination should be but 45 head.

As you will note from your affidavit, carriers are not responsible for animals that die while being held in the yards at N. Little Rock for dipping. Inspector Denman at North Little Rock stated that some of the animals had been badly burned while dipped at origin, and that other animals did [fol. 159] not appear to have been dipped at all. There were many poor thin animals in the consignment and cars were badly crowded.

The shipment from Ladelle went through without any damage.

Stock in a condition that this was subject to two dippings at North Little Rock in addition to the same service given at origin and from the statement of the inspector that a number of the animals had been badly burned is not surprising that there was considerable mortality and from reason for which carriers are not responsible.

* * * * * * *

Yours truly, R. B. Williamson, F. C. A. W. D. P. WDP 4.

(Plaintiffs' Exhibit "B" concluded—as introduced and read.)

PLAINTIFFS' EXHIBIT "B" (AS OFFERED BY PLAINTIFFS)

Form 6179.
3 27 10M.
Missouri Pacific Lines.

Missouri Pacific Railroad Company, Freight Claim Department, 1224 Railway Exchange Building, St. Louis, Mo.

[fol. 160] R. B. Williamson, Freight Claim Agent. H. V. Cooper, Asst. Freight Claim Agent

Claim E-89452-26

St. Louis, Mo., Sept. 8, 1927.

Hartley Brothers, Centralia, Okla.

GENTLEMEN: With reference to your bill of June 30, 1927, amount $1,104.00, would state that we have investigated the handling of these various shipments and cannot find any evidence of negligence on the part of the carriers. Our records show that upon arrival at North Little Rock, there were dead in the car, five animal- and there were eight animals down, which died in the pen and that there were 25 cattle died in the pens, between dippings. There were 12 dead upon arrival at destination. This would make total of 45 head. We note your claim is based for 46 head.

The billing covers but 425 head and is the number accounted for, so that the actual difference at destination should be but 45 head.

As you will note from your affidavit, carriers are not responsible for animals that die while being held in the yards [fol. 161] at N. Little Rock for dipping. Inspector Denman at North Little Rock stated that some of the animals had been badly burned while dipped at origin, and that other animals did not appear to have been dipped at all. There were many poor thin animals in the consignment and cars were badly crowded.

The shipment from Ladelle went through without any damage.

Stock in a condition that this was subject to two dippings at North Little Rock in addition to the same service given at origin and from the statement of the inspector that a number of the animals had been badly burned is not surprising that there was considerable mortality and from reason for which carriers are not responsible.

Deducting from the 45 head, the 25 that died in the pens at Little Rock between dippings, left a loss of 20 head of a value of $480.00. We would be willing to reimburse you to the extent of $250.00 and advice that a draft for that figure is acceptable in full settlement, will find payment forthcoming.

Yours truly, R. B. Williamson, F. C. A. W. D. P.

WDP 4.

(Plaintiffs' Exhibit "B" concluded—as offered by Plaintiffs.)

[fol. 162] By Mr. Moreland:

Q. Mr. Hartley, they never paid this claim that you presented?

A. No, sir.

Q. And the reasons given in that letter (indicating) are the only reasons that were given for refusing to pay the claim?

A. Yes, sir.

Mr. Moreland: That is all.

Mr. Curtis: At this time we want to move to strike all of that part of this witness' last examination which purports to cover conversations had between him and Mr. Galatian, the agent at Delaware, in connection with the discussion leading up to the filing of this claim.

The Court: The motion is denied and overruled. However, I will admonish the jury that any statements made by the depot agent would not be binding upon the company, because he would not have the authority to do that; they are only admissible in so far as they attempt to give the reasons for the filing of that claim in its form.

Cross-examination.

By Mr. Curtis:

Q. Now, then, Mr. Hartley——

[fol. 163] Mr. Moreland: Give us an exception to that explanation given to the jury by the Court.

By Mr. Curtis:

Q. In that conversation did you advise Mr. Galatian, the agent at Delaware, in connection with these conversations that Mr. Moreland has spoken about, leading up to the making out of this claim, of the fact that some of those cattle came into Little Rock over the Rock Island railroad and with this particular cow there that was injured and probably one other animal that was dead, and that there was a considerable number of them that died while being held at Little Rock for dipping and inspection?

A. Why, yes, I told him—he knew—he knew which roads that these cattle came in over, and the bills showed that—which roads.

Q. Certainly, the bills showed which roads they came in over, but did you advise him of the deaths that occurred and the injuries that probably occurred on the Rock Island—of the deaths that occurred while they were being held in the pens there between dippings over there?

A. Well, I don't remember—I might have told him, but I don't remember telling him.

Mr. Curtis: That is all.

(Witness excused.)

Fred Sharp, being called as the next witness on behalf [fol. 164] of the Plaintiffs and being first duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Moreland:

Q. State your name to the court and jury.
A. Fred Sharp.
Q. Where do you live, Mr. Sharp?
A. Five miles east of Delaware—Nowata County.
Q. What business are you engaged in?
A. Cattle business.
Q. How long have you been engaged in the cattle business?
A. I was raised—I never did know nothing else. I was just raised with a bunch of cattle.
Q. How old are you now?
A. Thirty-three.
Q. You have bought and shipped cattle?
A. Yes, sir.
Q. Raised them and fed them?
A. Yes, sir.
Q. Are you acquainted with Hartley Brothers, who are the plaintiffs in this case?
A. Yes, sir.
Q. Did Mr. Hartley put any cattle on your pastures in May of 1927?
A. Yes, sir; he put a bunch of cattle—I wouldn't say exactly how many; but they was put in there on the 15th [fol. 165] day of May, 1927, and stayed there about ten days or two weeks.
Q. Where were these cattle from, if you know?
A. They were southern cattle.
Q. What do you mean?
A. Arkansas cattle.
Q. Arkansas cattle? What type of cattle were these, Mr. Sharp?
A. Well, they were just mixed. They were everything from calves to grown cows, and some three or four year old steers on them.
Q. What was their condition as to flesh and strength and vitality and general appearance?
A. Well, these cattle were in fair stocker flesh——
Q. Fair——
A. —For the time of the year—for it being the spring of the year and all.

Q. From your observation of these cattle and your experience in handling them and dealing with them, were they in condition to ship?

A. Yes, sir—they was—I—well, there was part of these cattle, when they got to my place, wouldn't have been in condition to be shipped again, because they was punched and beat around until they was pretty near into jelly.

Q. Were you there when the cattle were brought to your place?

[fol. 166] A. No, sir, I wasn't there that morning they put them in there, but I was there the next morning afterwards, the morning of the 16th.

Q. The morning afterwards?

A. Yes, sir.

Q. Now, you saw the cattle, then, probably the first time on the morning of the 16th? Is that right?

A. Yes, sir. Well, I saw them up in the pasture, but I was not close to them—I didn't go to them until the next morning—the 16th.

Q. What condition did you find these cattle in when you went out there on the morning of the 16th?

A. Well, I found twenty-seven dead—the farthest one couldn't have been 100 yards from the gate—all of them dead.

Q. What condition did you find the others in?

A. Well, there was several more of them that was—looked to me like a dying condition.

Q. Did they later die?

A. Well, there was in the neighborhood of, I would say, fifty-five or sixty cattle died there in a radius of ten days from the time they was put in there——

Q. —On your pasture?

A. Yes, sir.

Q. Now, you did see the cattle that were dead there, and those that were injured and later died, didn't you?

A. Yes, sir.

[fol. 167] Q. What was their general appearance with reference to injuries or to being injured?

A. Well, they were tromped and bruised and skinned all over where they had been down in the cars and tromped.

Q. Did all of the cattle that died there while they were on your place show these injuries or these marks of such injuries?

A. Yes, sir.

Q. Now, what was the condition of these cattle that died, as compared to the cattle that lived, with reference to their flesh and strength and general condition?

A. Well, they looked like to me they was all practically in the same flesh, only these cattle had just been bruised up and they was lame, and some of them couldn't hardly walk, from being bruised and legs throwed out of place and first one thing and another, and just butchered up from being shipped, is all I could say.

Q. You would say the cattle that died were a fair average of the general lot?

A. Yes, sir, just a fair average of the bunch of cattle. They ran big and little. They wasn't all little that was killed. It looked like just an average—large and small.

Q. I see.

A. And they were just mixed cattle. There was some of all kinds that died, because I helped haul them off and helped burn them.

[fol. 168] Q. They died on your place there?

A. Yes, sir.

Q. Mr. Sharp, have you ever had occasion to dip cattle and to handle cattle that had been dipped?

A. No, sir, I don't believe I ever did.

Q. Have you ever seen cattle when they were dipped?

A. Yes, sir.

Q. Have you ever seen cattle that were injured by being dipped?

A. Yes, sir.

Q. What is there about the dip that causes the injury occasionally?

A. Well, if they get their dip too strong, why, it just kind of cooks the hide and peels up—scales off like the scales of a fish.

Q. These cattle, now, that were in your pasture up there, that Mr. Hartley put there and that died there, and that you saw and observed: did they show the effects of having been burned in dipping?

A. No, sir, I didn't see a cow brute in the stock that showed the effects of being burned any way at all.

Q. As I understand it, you hauled these cows that died off and helped burn them?

A. Yes, sir, I hauled them and helped haul all of them that died there.

Q. Did you see a single one in this batch that you hauled off and burned that showed the effects of having been [fol. 169] burned in dipping?

A. No, sir.

Q. Did you see any of the cattle that lived that showed any of the effects of having been burned in dipping?

A. No, sir, I did not. I only had 100 of these cattle all summer, but there didn't any of the 100 show any of the effects of having been burned in dipping.

Mr. Moreland: That is all.

Cross-examination.

By Mr. Curtis:

Q. You didn't examine any of the rest of them?

A. I never did see them after Mr. Hartley moved them from my place.

Q. Did you go through the herd?

A. When they were in my pasture—yes, sir.

Q. You didn't notice any of the effects of dipping?

A. No, sir.

Q. You say these were southern cattle?

A. Yes, sir.

Q. What is called range cattle?

A. Arkansas cattle.

Q. The average Arkansas range cattle, that early in the spring, are rather pretty thin, aren't they?

A. Well, sometimes, and sometimes not so thin. These [fol. 170] cattle were in fair shape for the spring of the year.

Q. What do you mean by that?

A. Well, we didn't have to help them——

Q. You didn't have to help them to stand?

A. No, we didn't have to help any of them up and down.

Q. They didn't have enough flesh on them, did they?

A. Well, out of these cattle that was there ten days or two weeks, I will say that I never helped up a one, and I never seen anybody help one up, only these that were bruised up. There was a few of those that were bruised up, that we tried to save——

Q. How do you know that they were bruised up?

A. Well, I would take—there would be places where the hide was knocked off as big as my hand, and I would imagine they were bruised, and the hip bones knocked down, and shoulders—some of those cattle couldn't touch a front foot to the ground. There was five or six that I remember very well helping around there for a day or two. Whenever you would help them up, one leg would be game and they couldn't stand up.

Q. Do you know how far your pasture is from the station at Delaware?

A. I do.

Q. How far is it?

A. It is exactly five miles.

Q. Do you know whether or not these cattle were driven [fol. 171] from the——

A. There was twenty-some-odd head of these cattle hauled.

Q. And the rest of them were driven out there?

A. Yes, sir.

Q. They went out on their own power?

A. Yes, sir, that is what I heard; that is what Mr. Hartley told me. He hauled some twenty-some-odd head of them. I didn't see these cattle put in; I wasn't there the day they were put in there. They were put in there the 15th, and I wasn't out among the cattle until the morning of the 16th.

Q. So your testimony of how they got out there: that is just what you heard some one else say about it?

A. Yes, sir.

Q. Are you accustomed to handling southern cattle in the early spring?

A. Yes, sir, I have handled about all kinds.

Mr. Curtis: That is all.

Mr. Moreland: That is all.

(Witness excused.)

T. H. Hartley, recalled as a witness on behalf of the Plaintiffs, and having been previously duly sworn, testified further as follows, to-wit:

[fol. 172] Direct examination.

By Mr. Moreland:

Q. You are the same T. H. Hartley that was on the stand before?

A. Yes, sir.

Q. Mr. Hartley, have you had occasion to dip cattle yourself?

A. Yes, sir.

Q. And have you owned cattle before they were dipped?

A. Yes, sir.

Q. You have seen cattle dipped?

A. Yes, sir.

Q. Had experience with that line of work?

A. Yes, sir.

Q. Is there such a thing as cattle being injured by dipping?

A. Well, yes, they can be dipped too strong.

Q. What do you mean by "dipped too strong"?

A. The dip too strong—test too high.

Q. I see.

A. The government test is——

Q. What effect does this strong dip have on them?

A. Well, when they are dipped too strong, why, it blisters—maybe little blisters and places a foot square, and just scale off.

Q. Does it show up on their skin?

A. Yes.

[fol. 173] Q. This dipping?

A. Yes, sir.

Q. Now, these cattle that Mr. Rana brought up there: did any of them show any of the effects of dipping, Mr. Hartley?

A. No, sir.

Q. And you saw these cattle when they were in the pens at Little Rock, after they had been dipped at the point of origin and after they had been dipped once at Little Rock, didn't you?

A. Yes, sir.

Q. Did they show any of the effects of it then?

A. No, sir.

Q. Any of these cattle which were dead when they got to Delaware and which died after they got there: did they show the effects of having been burned in dipping?

A. No, sir.

Q. From your experience in this line, and from your observation of these cattle that did die up there, would you say that they died from the effects of being dipped?

A. Ask the question again, please.

Q. I say, from your experience in dipping cattle and seeing them dipped and the effect that it has on them, would you say that these cattle which were dead when they got to Delaware and those which died after they got there, died from the effects of being burned in the dip?

A. No, sir.

[fol. 174] Q. They were not——

Mr. Moreland: That is all.

Cross-examination.

By Mr. Curtis:

Q. I will ask you, as a matter of fact, Mr. Hartley, if the dipping of cattle, regardless of the flesh, does not have a tendency to weaken them, and regardless of whether or not the dip is a proper mixture?

A. Well, to some extent it does; even to just chousing cattle around; it tends to weaken them to some extent.

Q. And the effect of the dipping on them—even a well cow and one that would be in fairly good flesh—weakens them some, doesn't it?

A. To some extent, yes.

Mr. Curtis: That is all.

(Witness excused.)

Dow Rana, being recalled as a witness on behalf of the plaintiffs and being first duly sworn according to law, testified further as follows, to-wit:

Direct examination.

By Mr. Moreland:

[fol. 175] Q. State your name to the Court and jury.

A. Dow Rana.

Q. Are you the same Dow Rana who was on the stand before?

A. Yes, sir.

Q. Mr. Rana, have you ever had occasion to dip cattle?

A. Yes, sir.

Q. Have you seen cattle dipped?

A. Yes, sir.

Q. And you are familiar and experienced with that line of work?

A. Yes, sir.

Q. Is there such a thing as injuring cattle by dipping them, and the cattle being hurt that way?

A. Well, they could if they was too—probably, if they should get the dip too strong. I never had any injured that way, but they could be, I guess——

Q. Have you seen cattle that were injured by being dipped too strong?

A. Yes, sir, I have seen them that was blistered a little, was about all.

Q. What effect does this strong dip have on them when it burns them?

A. It will blister cattle.

Q. Is that the skin that it blisters?

A. Yes, sir, kind of crackles up the hide.

[fol. 176] Q. Dries it up?

A. Yes, sir.

Q. These cattle were dipped in Arkansas before you took them to Little Rock, weren't they?

A. Yes, sir.

Q. When you bought these cattle and at the time you loaded them at Malvern, Arkansas, did any of them show the effects of having been burned by the dip?

A. No, sir.

Q. Did any of these cattle show the effect of being burned by the dip after they were dipped the first time at Little Rock?

A. No, sir.

Q. Did any of these cattle which were dead when they reached Delaware and those which died after they reached Delaware show the effects of having been burned by this dip?

A. No, sir, not that I could tell.

Q. The cattle which lived after they got to Delaware: did any of those show the effect of having been burned by the dip?

A. No, sir.

Q. Could you tell it on any of them?

A. Not that I could tell on any of them at all.

Mr. Moreland: That is all.

Cross-examination.

By Mr. Curtis:

[fol. 177] Q. The dipping of any kind of a cow, though, has a tendency to weaken her, doesn't it?

A. I never did pay any attention to it weakening them—it might do such a thing—I don't know.

Q. Don't you know that the opposition among the farmers to the dipping of cattle down in that part of the country grew out of the fact that it was injurious to them and that it weakened them?

Mr. Robson: We object to that as calling for an opinion and conclusion, and not proper cross-examination.

The Court (addressing reporter): Read the question.

(Question was read as follows:)

Q. Don't you know that the opposition among the farmers to the dipping of cattle down in that part of the country grew out of the fact that it was injurious to them and that it weakened them?

The Court: Objection sustained.

Mr. Curtis: Exception.

Mr. Robson: And we object to it, further, as assuming a fact not in evidence. There is nothing to show that there is any opposition to it.

The Court: Objection sustained.

By Mr. Curtis:

Q. And it is your observation, then, that it doesn't have [fol. 178] any effect on a cow, regardless of her flesh, to dip her?

A. We dipped about 400 head every fourteen days, and they done mighty good—on the ranch.

Q. Range cattle?

A. Yes, sir.

Q. Is this this particular 400 head?

A. No, sir, that was another time, before that; but I say that is my experience; we dipped that many on the ranch—do dipped them every fourteen days.

Q. That was not this same bunch in question, was it?

A. That wasn't concerning this bunch. I was just telling you and the jury about this——

Q. Well, you have had just two experiences? That is, besides the shipment that you sold to Mr. Hartley, you have had only one dipping experience?

A. I bought 361 cattle over there at Little Rock last June—just like I did these cattle. I sold them to another man in Oklahoma.

Q. And dipping those three different herds are the only three experiences that you have had?

A. I have helped dip and had cattle dipped for the last seven or eight years—been connected up with it different times.

Q. Don't you know, as a matter of fact, from your experience, then, that it has a weakening effect on them to [fol. 179] dip them, and that they lose their strength and their vitality when dipped?

A. Never hurt these other cattle at all——

Q. I am just asking you that question; I don't want to get an argument with you. Just answer the question. Don't you know that it has a weakening effect?

A. I don't know——

Q. You don't know that?

A. No, sir.

Mr. Curtis: That is all.

Mr. Moreland: That is all.

(Witness excused.)

Mr. Moreland: The plaintiffs rest.

Plaintiffs rest.

Demurrer to Plaintiffs' Evidence

Mr. Curtis: Comes now the defendant, at the time the plaintiffs rest their case, and demurs to the evidence on the

ground and for the reason that said evidence, under the law and taken as a whole, is not sufficient to establish or sustain a cause of action in favor of the plaintiffs and against the defendant.

[fol. 180] The Court: The demurrer is overruled.

Mr. Curtis: The defendant excepts.

(Thereupon the defendant, in order to attempt to sustain the issues on its behalf, introduced its evidence, consisting of exhibits, depositions, and oral testimony of witnesses, all as hereinafter fully set out and shown:)

DEFENDANT'S TESTIMONY AND EVIDENCE

Mr. Curtis: At this time, if the Court please, the defendant desires to file or introduce in evidence a stipulation signed by attorneys both for plaintiffs and defendant, in reference to the shipper's contract under which the car of cattle, which originated at Ladelle, moved, and we ask that it (handing paper to Reporter) be marked for identification as Defendant's Exhibit "2".

(The paper handed to reporter and referred to was marked Defendant's Exhibit "2," as requested.)

Mr. Curtis: And ask that it be considered in evidence. We will not take time to read it now.

The Court: All right; Defendant's Exhibit "2" is introduced in evidence and is considered as read in evidence, and you may read it when you want to.

(Said Defendant's Exhibit "2," introduced in evidence, is in the words and figures following, to-wit:)

DEFENDANT'S EXHIBIT "2"

IN THE DISTRICT COURT OF ROGERS COUNTY, IN THE STATE OF OKLAHOMA

[fol. 181] No. 7709

HARTLEY BROS., Plaintiffs,

vs.

MISSOURI PACIFIC RAILROAD COMPANY, Defendant

STIPULATION

It is hereby stipulated and agreed by and between Robson & Moreland, attorneys for plaintiffs, and W. L. Curtis,

attorney for the defendant, that the duplicate original live-stock contract executed on the 4th day of May, 1927 by H. O. Underwood, shipper, and the A. D. & N. R. R. Co. as Carrier, pertaining to the 39 head of cattle loaded in R. I. car No. 77333, may be admitted in evidence without formal proof.

And it is further stipulated and agreed that the cattle comprising the above shipment and referred to in said live stock contract was diverted and finally delivered to the Missouri Pacific Railroad Company at North Little Rock, Arkansas, and was later re-shipped from that point, on account of plaintiffs, and constitutes one of the cars of cattle out of which the above styled cause of action originated.

Dated this the 9th day of August, 1928.

[fols. 182–196] (Signed) Robson & Moreland, Attorneys for Plaintiffs. (Signed) W. L. Curtis, Attorney for Defendant.

(Defendant's Exhibit "2," concluded.)

Mr. Curtis: And we also, under the terms of the stipulation, desire to offer in evidence the duplicate original contract concerning the car that originated at Ladelle, and ask to have it (handing paper to reporter) marked for identification as Defendant's Exhibit "3."

(The paper handed to reporter was marked as requested.)

Mr. Curtis: We now offer Defendant's Exhibit "3" in evidence.

The Court: Is there any objection?

Mr. Moreland: No objection.

The Court: It will be admitted in evidence.

(Said Defendant's Exhibit "3," introduced in evidence, is, together with all endorsements and notations thereon, in the words and figures following, to-wit:)

* * * * * * *

[fol. 197] Mr. Moreland: I might state in connection with the introduction of this livestock contract, Defendant's Ex-

hibit "3," and in connection with the stipulation which has been introduced here and which was entered into last summer, that the testimony has developed on the part of the plaintiff that the car of cattle which came from Ladelle arrived all right and there was no injury to them, and we are not seeking any damages on account of that car in this suit.

Mr. Curtis: The defendant now desires to offer in evidence the deposition of Mr. W. E. Taylor, taken at Malvern, Arkansas, on the 6th day of August, 1928.

The Court: Is there any objection to the deposition?

Mr. Moreland: No.

The Court: All right; it is admitted.

Mr. Curtis: We will omit the agreement to take, and the caption——

The Court: Do you want the attorney for the defendant to read all of those formalities?

Mr. Moreland: No; read just the questions and answers.

The Court: All right.

(Thereupon the following deposition was read on behalf of the defendant, there occurring certain objections, rulings of the court, and exceptions thereto, during the reading of said deposition, as shown by the following:)

DEPOSITION OF W. E. TAYLOR

"W. E. TAYLOR was thereupon called as a witness for the defendant and, being first sworn to tell the truth, upon his oath deposes and says:

"By Mr. Curtis:

"Q. What is your business, Mr. Taylor?

A. I am local agent for the Missouri Pacific Railroad Company and the Rock Island Railroad Company at this town (Malvern, Arkansas).

[fol. 198] Q. What, if any, is your duty, as agent for the Missouri Pacific Railroad Company in accepting shipments of livestock for transportation over said road and taking and executing livestock contracts in connection therewith?

A. I first get an order for how many cars they want and the date on which they want to ship. Then I order the cars from Little Rock. After they are placed here, then I get

the time for loading from the Dispatcher. When that is done we are ready then for the cattle to be put in the pens for inspection. We notify the shipper to bring in his cattle. And after the cattle are loaded the contracts are signed.

Q. Did you load out four cars of cattle on the Missouri Pacific here on May 4th, 1927?

A. Yes, sir.

Q. Was livestock contracts signed in connection with each one of those cars?

A. Yes, sir.

Q. Have you made exact copies of each of the original contracts?

A. Yes, sir."

"At this point the original livestock contracts executed on these shipments were inspected by attorneys for the plaintiff, and it is thereupon agreed that exact copies thereof may be introduced and attached hereto in lieu of the originals."

[fol. 199] "Q. I now hand the witness four separate contracts, and ask him if those are duplicate, original copies of the contracts under which the four cars of cattle was shipped on May 4th, 1928?

A. They are."

"Mr. Curtis: We desire to introduce such exact copies in evidence and ask that they be marked Exhibits 1, 2, 3, and 4 to witness' deposition. And the copies are admitted."

(Said exhibits immediately follow this deposition.)

"Q. I'll ask you, if at the time of the execution of said contracts, if the shipper, or their agent, filed with you affidavits showing or setting out their representations as to the dipping of the cattle moving under said contracts?

A. Yes, sir.

Q. I now ask if these four sheets of paper are the four affidavits with reference to the dipping?

A. They are."

"Mr. Curtis: The defendant now offers these affidavits in evidence and ask that they be marked exhibits 5, 6, 7, and 8, attached to the witness' deposition as a part thereof."

"Mr. Moreland: Plaintiff objects on the grounds that the

said are irrelevant, incompetent and immaterial, and do not tend to prove or disprove any issue in this case."

(Reading of deposition was here interrupted by the fol-
[fol. 200] lowing:)

The Court: What are they, Mr. Curtis?

Mr. Curtis: They are the affidavits pertaining to the dipping of the cattle.

The Court: Whom are they made out by—the government authorities or the parties?

Mr. Curtis: Well, that (indicating) was the shipper, Mr. Wm. Henry. I suppose he was the fellow that was going to ship, and the fellow from whom Mr. Rana testified that he bought part of these cattle. Some of these cattle were bought from him, and some of them from Fisher.

The Court: What is the purpose of the introduction—to show that they had been dipped prior thereto?

Mr. Curtis: Yes, sir, and to comply with the quarrantine regulations. I do not know that, in the development of the testimony later on in the case, they are important. At that time I did not know——

The Court: I think the testimony has shown that they have been dipped, here.

Mr. Curtis: Yes.

The Court: Do you want to reiterate that objection?

Mr. Moreland: Yes.

The Court: Objection sustained.

[fol. 201] Mr. Curtis: I believe we will save our exception——

The Court: All right.

Mr. Curtis: —Because I haven't any time to analyze it further now. So we will just save the point and save our exception on it now.

(Reading of deposition continued as follows:)

"Q. Did you look these cattle over at the time they were loaded?

A. Yes, sir.

Q. What was their general appearance and condition of the cattle?

A. Being described as stocker cattle, we allowed that to go. While the cattle were thin, we thought that the stocker cattle would take care of that part.

Q. Was the cattle mixed as to size and ages?

A. Yes, sir. That accounts for there being so many in one car. You can't load eighty large cattle in one car, they have to be calves as these were.

Q. I see a notation on the contract, "Shipper's load and count"; what significance or meaning does that notation have?

A. That means they were not counted by a representative of the company.

Q. How long have you been an agent for the Missouri Pacific Railroad Company?

A. Since November 18, 1908, and at this station since [fol. 202] October 20th, 1926.

Q. Is there an official dipping vat or station at this place?

A. I don't know how it is handled or where it is, but there is one around here somewhere.

Q. Were these particular cattle supposed to have been dipped at the local vat, as shown by the affidavits?

A. Yes, sir."

Mr. Curtis: To that last question Mr. Moreland objects again—I will read his objection:

"Mr. Moreland: The plaintiffs object to the question and answer, and ask that they be stricken for the reason that they are irrelevant, incompetent and immaterial, and do not tend to prove or disprove any issue in this case."

(Note.—This is the end of the deposition proper.)

Mr. Moreland: If the Court please, at this time, let me see those dipping affidavits that were attached to the deposition.

(Mr. Curtis handed Mr. Moreland the deposition.)

Mr. Moreland: At this time, the plaintiffs withdraw their objection to the introduction of those dipping affidavits (exhibits 5, 6, 7, and 8) for the reason that it was shown here this morning in the previous testimony that the cattle had been dipped, and there is no dispute on that.

The Court: All right; Exhibits 5, 6, 7, and 8 will be ad- [fol. 203] mitted.

(Said exhibits are hereinafter set out, immediately following Exhibits 1, 2, 3, and 4.)

The Court: I don't believe I ruled on that last objection, there in the deposition, to the question and answer. It is overruled.

Mr. Curtis: Well, counsel for plaintiffs withdrew his first objection, any way, your Honor.

The Court: All right.

Mr. Curtis: We also offer in evidence the other exhibits attached to the deposition, the shipper's contracts, the same being Exhibits 1, 2, 3, and 4, which are the regular forms; and we will not take time to read those at this time.

(No objection was made.)

The Court: All of the exhibits attached to the deposition, numbered from 1 to 8 inclusive, are admitted in evidence.

(Said Exhibits of the defendant, attached to the foregoing deposition and numbered 1, 2, 3, 4, 5, 6, 7, and 8, introduced in evidence without objection, are, respectively, together with all notations and endorsements on each, in the following words and figures and in the following order, to-wit:)

[fol. 204] EXHIBIT 1 TO DEPOSITION OF W. E. TAYLOR

Copy

Form 1134. 12-25 50M

Number of Cars: —. Contract No.: —.

(Uniform Live Stock Contract Adopted by Carriers in Official, Southern and Western Classification Territories, March 15, 1922.)

Uniform Live Stock Contract

(Prescribed by the Interstate Commerce Commission)

This form of contract to be used for shipments of Live Stock and Wild Animals instead of Uniform Bill of Lading.

Duplicate. Not negotiable.

Contract must be issued in duplicate; one copy delivered to the shipper, the other to be retained by agent for his permanent file.

Missouri Pacific.

Missouri Pacific Railroad Company

Malvern, Ark., Station, May 4th, 1927.

This agreement, made this 4th day of May, 1927, by and between the Missouri Pacific Railroad Company, party of the first part, hereinafter called the carrier*, and (Shipper's [fol. 205] name) Dean Hardy, part of the second part, hereinafter called the shipper;

Whereas, the Classification and tariffs under which this agreement is made require that, for the purpose of applying the lawful rate of freight, the shipper must declare the shipment to be "Ordinary Live Stock," specifying the kind or kinds of animals, or if not "Ordinary Live Stock" he must declare the kind and value of each animal, space for such declaration being provided below:

Now, Therefore, This Agreement Witnesseth, That the carrier has received from the shipper, subject to the classifications and tariffs in effect on the date of issue of this agreement, the live stock described below, in apparent good order, except as noted, consigned and destined as indicated below, which the carrier agrees to carry to its usual place of delivery at said destination, if on its road or on its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier* of all or any of said live stock over all or any portion of said route to destination, and as to each party at any time interested in all or any of said live stock, that every service to be performed and every liability incurred in connection with said shipment shall be subject to all the conditions, whether printed or written, herein contained, including the conditions on back hereof, and which are [fol. 206] agreed to by the shipper and accepted for himself and his assigns.

Consigned to Dow Rana. Destination: Blue Jacket, State of Okla., County of ——. Route: ——. Car Initials and Numbers: M. P. 50011.

Ordinary Live Stock

Ordinary live stock means all cattle, swine, sheep, goats, horses and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses. On shipments of ordinary live stock no declaration of value

shall be made by the shipper; nor shall any values be entered on this bill of lading.

I (We) declare the shipment covered by this bill of lading to be ordinary live stock.

(Signed) Dow Rana, Shipper.

Other than Ordinary Live Stock

On shipments of live stock chiefly valuable for breeding, racing, show purpose, or other special uses different rates of freight are in effect dependent on the valuation placed thereon by the shipper; which valuation may be the basic value as stated in the classification, at which the lowest freight rate applies, or it may be any higher valuation up to actual value, in which event the freight rate will be [fol. 207] higher by the amount prescribed in the tariffs or classifications. Such declared or agreed values shall be entered in the column provided therefor in this bill of lading, and in no event shall the carrier be liable for any amount in excess of such valuation.

I (We) declare the shipment covered by this bill of lading to be other than ordinary live stock, and of the value herein declared, or agreed upon, and entered.

——— ———, Shipper.

NOTE.—The shipper shall execute one of the above declarations. Upon refusal of a shipper of other than ordinary live stock to declare the values of said stock for entry in this bill of lading the shipment will not be accepted for transportation under this contract. In the event the shipment consists of both ordinary live stock and other than ordinary live stock, both of such declarations shall be executed, but values shall be declared and entered only on the other than ordinary live stock.

Number and description of animals	Shipper's declared value (if on live stock chiefly valuable for breeding, racing, show purposes or other special uses)	Weight (subject to correction)	Rate of freight	
			Per 100 lbs.	Per car
58 Stocker Cattle.				

Shipper's load and count.

[fol. 208] If this shipment is to be delivered to the consignee, without recourse on the consignor, the consignor shall sign the following statement:

Delivery shall not be made of this shipment without payment of freight and all other lawful charges.

(See Section 3 of Conditions.)

Signature of Consignor: —— ——.

If charges are to be prepaid, write or stamp here, "To be prepaid."

Acknowledgment to be Used if Freight Is Prepaid

Received $— to apply in prepayment of the charges on the live stock described hereon.

——— ———, Agent or Cashier, per ——— ———.

(The signature here acknowledges only the amount prepaid.)

Charges advanced, $—.

Witness my hand, Dean Hardy, Shipper, by Dow Rana, Shipper's Agent.

Missouri Pacific Railroad Company, by W. E. Taylor, Agent, per A. L. Parker.

Witness: ——— ———.

*The word "carrier" is to be understood throughout this contract as including any person or corporation in [fol. 209] possession of the live stock under the contract.

(On the back thereof appears the following:)

Contract Terms and Conditions

Sec. 1. (a) Except in the case of its negligence proximately contributing thereto, no carrier or party in possession of all or any of the live stock herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarrantine, the authority of law, the inherent vice, weakness, or natural propensity of the animal, or the act or default of the shipper or owner, or the agent of either, or by riots, strikes, stoppage of labor or threatened violence.

(b) Unless caused by the negligence of the carrier or its employees, no carrier shall be liable for or on account of

any injury or death sustained by said live stock occasioned by any of the following causes: Overloading, crowding one upon another, escaping from cars, pens, or vessels, kicking or goring or otherwise injuring themselves or each other, suffocation, fright, or fire caused by the shipper or the shipper's agent, heat or cold, changes in weather or delay caused by stress of weather or damage to or obstruction of track or other causes beyond the carrier's control.

[fol. 210] (c) In case of quarrantine, the live stock may be discharged at risk and expense of owners into quarrantine depot or elsewhere, as required by quarrantine regulations or authorities, or for the carrier's dispatch, or at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when the property is so discharged, or the property may be returned by carriers at owner's expense to shipping point, earning freight both ways. Quarrantine expenses of whatever nature or kind upon or in respect to the property shall be borne by the owners of the property or be a lien thereon. In case a shipment is stopped in transit by quarrantine, the carrier shall immediately give notice of such fact to the shipper or consignee. Except in the case of its negligence proximately contributing thereto, no carrier shall be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done under quarrantine regulations or authorities, nor for detention, loss, or damage of any kind occasioned by quarrantine laws or in the enforcement thereof; and the shipper shall hold the carrier harmless for any expense it may incur or damages it may be required to pay by reason thereof.

Sec. 2. (a) No carrier is bound to transport said live stock by any particular train or vessel or in time for any particular market, or otherwise than with reasonable dispatch. Every carrier shall have the right in case of [fol. 211] physical necessity to forward said live stock by any carrier or route between the point of shipment and the point of destination.

(b) In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the live stock as determined by the classification or tariffs upon which the rate is based, such lower

value, plus freight charges, if paid, shall be the maximum amount to be recovered whether or not such loss or damage occurs from negligence.

(c) Claims for loss, damage, or injury to live stock must be made in writing to the originating or delivering carrier or carriers issuing this bill of lading within six months after the delivery of the live stock (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within six months (or nine months in case of export traffic) after a reasonable time for delivery has elapsed; provided, that if such loss, damage or injury was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery. Suits for loss, damage, injury or delay shall be instituted only within two years and one day after delivery [fol. 212] of the live stock, or in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed; or Provided, that in case of the claim on which suit is made was based in writing within six months, or nine months in case of export traffic (whether or not filing of such claim is required as a condition precedent to recovery) suit shall be instituted not later than two years and one day after notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof, specified in the notice.

Sec. 3. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this live stock contract until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates by signature in the space provided for that purpose on the face of this contract that the carrier shall not make delivery without requiring payment of such charges, and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor shall not be liable for such charges.

[fol. 213] Nothing herein shall limit the right of the carrier to require at the time of shipment the payment or guarantee of charges.

Sec. 4 (a). The shipper at his own risk and expense shall load and unload the live stock into and out of cars, except in those instances where this duty is made obligatory upon the carrier by statute or is assumed by a lawful tariff provision. In case any person shall accompany the live stock in charge of same, he shall take care of, feed and water the live stock while being transported, whether delayed in transit or otherwise, and whenever such person shall open or close any door or opening in the cars or cars, or the pens or compartments in the vessel, he shall see that the same are so closed and fastened as to prevent the escape therefrom of any of the live stock.

(b) When bedding or other appliances of a character not generally in use in the transportation of live stock are required they shall be furnished by the shipper at his own expense, and he shall separate different kinds of stock when loaded in the same car by adequately strong partitions and such stock shall be at the risk of the shipper as to any damage resulting from the insufficiency or inadequacy of any such bedding, appliance or partition.

(c) Before the live stock is removed from the possession of the carrier or mingled with other live stock the shipper, owner, consignee or agent thereof shall inform in [fol. 214] writing the delivering carrier of any visible or manifest injury to the live stock.

Sec. 5 (a). If all or any part of said live stock is carried by water over any part of said route, such water carriage shall be performed subject to all the terms and provisions of and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, and to the conditions contained in this bill of lading not inconsistent therewith or with this section.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on

board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances, whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the [fol. 215] voyage. And, when for any reason it is necessary, any vessel carrying any or all of the live stock herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, transship, or lighter, to load and discharge goods at any time, and assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in the case of negligence, such carrier shall not be responsible for any loss or damage to live stock if it be necessary or is usual to carry the same upon deck.

(d) General average shall be payable according to York-Antwerp Rules, 1890, and, as to any matter not therein provided for, according to the law and usage of the port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence, the shippers, consignees and/or owners of the cargo, shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the [fol. 216] payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for

the common benefit or to relieve the adventure from any common peril.

(e) If the live stock is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions which shall be regarded as incorporated into the conditions of this uniform live stock contract.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 6. Any alteration, addition, or erasure in this contract which shall be made without an endorsement thereof hereon, signed by the agent of the carrier issuing this agreement, shall be without effect, and this agreement shall be enforceable according to its original tenor.

Contract No. —

Missouri Pacific Railroad Company

Separate Contract with Man or Men in Charge of Live Stock

[fol. 217] —— Station, —— —, 19—.

In consideration of the carriage of the undersigned upon a freight train or vessel in charge of the live stock mentioned in the within contract, whether with or without charge for such carriage, each one of the undersigned severally hereby voluntarily assumes all risk of accident or damage to his person or property, and hereby releases and discharges each and every carrier from every claim, liability, or demand of any kind for or on account of any personal injury or damage of any kind sustained by him, unless caused by the negligence of such carrier or any of its employees; and agrees that whenever he shall leave the caboose and pass over or along the cars or track he will do so at his own risk of personal injury, except where the negligence of the carrier proximately contributes thereto,

and that no carrier shall be required to stop or start its train or caboose cars at or from the depot or platforms, or to furnish light for his accommodation or safety.

—— ——.

NOTE.—Agent must cross out lines not used, so that additional names cannot be inserted.

Witness: —— ——.

Notice

While traveling with the stock this contract will be good [fol. 218] for passage of the caretaker or caretakers designated above.

If entitled to return transportation, this contract must be surrendered by the caretaker or caretakers to the Agent at destination of the stock if on Missouri Pacific lines in exchange for a Drover's Return ticket.

If destination is on connecting lines and such lines do not issue return transportation beyond their lines, Missouri Pacific Agent at junction point, upon surrender to him of this contract will issue Drover's return ticket from said junction point to point of origin of stock.

At points specified below contracts may be surrendered and drovers' tickets obtained in lieu thereof:

St. Louis, Mo.: Freight Traffic Department, 1292 Railway Exchange Bldg.; Agent Tower Grove Station. Open Sundays and Holidays.

East St. Louis, Ill.: Live Stock Agent, National Stock Yards.

Kansas City, Mo.: General Live Stock Office and Local Agent.

South Omaha, Neb.: Local Agent.

[fol. 219] Omaha, Neb.: Assistant General Freight Agent.

St. Joseph, Mo.: Division Freight Agent and Local Agent.

Wichita, Kan.: Local agent; also Joint Agent, Union Stock Yards.

And other points of destination: The Local Agent will issue Drover's Tickets.

Agents taking up this Contract and issuing Drover's Ticket must endorse on face hereof the Form, number, des-

tination and date of Drover's Ticket and return same with Auditor's Stub with monthly ticket report to Auditor of Passenger Receipts, St. Louis, Mo.

Attendant, Mr. —— ——, has accompanied the Live Stock described in attached contract and handled in trains shown below:

From —— to ——. Train No. —. —— ——, Conductor. Date: —— —, ——.

From —— to ——. Train No. —. —— ——, Conductor. Date: —— —, ——.

[fol. 220] From —— to ——. Train No. —. —— ——, Conductor. Date: —— —, ——.

From —— to ——. Train No. —. —— ——, Conductor. Date: —— —, ——.

Freight Conductors must fill in the spaces provided for above in all cases when shippers or other employees are in charge of live stock; also show date and points between which attendants were in charge.

NOTE.—Agents will cross out description with ink of party or parties accompanying stock.

Description of Party in Charge Accompanying

		1	2	
				Age
	Size	o	o	Slim
		o	o	Medium
		o	o	Stout
[fols. 221-281]	Height	o	o	Tall
		o	o	Medium
		o	o	Short
	Hair	o	o	Light
		o	o	Gray
		o	o	Dark
		o	o	Red
	Beard	o	o	Mustache
		o	o	Chin
		o	o	Side
		o	o	Full Beard
		o	o	None

Certification at Destination

This is to certify that I or we personally accompanied the live stock covered by this Contract from Original point of shipment to destination.

(Exhibit 1 to Deposition of W. E. Taylor concluded.)

[fol. 282] Exhibit 8 to Dep. of W. E. Taylor

To be Retained by Railroad Agent or Shipper

Department of Veterinary Science, Agricultural Experiment Station, University of Arkansas

Joe H. Bux, State Veterinarian

Malvern, Arkansas, May 4th, 1927.

I, Deane Hardy, under oath declare that I have carefully inspected the following described cattle, in compliance with the provisions of the Arkansas rules and regulations and supplemental regulations issued by the Department of Agriculture for the movement of cattle from tick infested areas and offer them for shipment. From Malvern, in Hot Spring County, State of Arkansas, to Blue Jacket, in —— County, State of Oklahoma, via ——.

Describe the cattle here: Stock cattle, 58 head.

Date of last two dippings: Last, April 19th, 1927. Previous, —— ——, ——.

These cattle are free of Texas fever ticks. Should they upon inspection while in transit or at destination be found infested with ticks, I agree to pay all costs incident to feeding and disinfecting while these cattle are held in quarantine, this cost to be a bona fide lien upon these cattle [fol. 283] which shall be paid before cattle are delivered at destination.

MP 50011.

Deane Hardy, Owner or Authorized Agent of Owner. (State which.)

Sworn to and subscribed before me. J. Elmo Young, N. P. (State title of Officer taking oath.) (Seal.)

For the Information of the Shipper

Cattle should not be dipped at less than fourteen day intervals if more than one dipping is made at point of origin and should not be dipped under seven days prior to the date of dipping at North Little Rock; supervisor of dipping will not be furnished if cattle have been dipped at closer intervals. Cattle intended for dairy and breeding purposes shall be required to successfully pass the Tuberculin test applied at origin or at North Little Rock Yards. Most states require a permit on female cattle and bulls for grazing or feeding purposes which shipper should have in his possession when such shipments are ready to pass out of the North Little Rock Yards.

(Exhibit 8 to Dep. of W. E. Taylor concluded.)

[fol. 284] Mr. Curtis: We next offer in evidence and desire to read Depositions taken on August 9th, 1928, at Little Rock, and, if agreeable, we will waive reading the agreement and the caption and the certificate to the depositions.

Mr. Moreland: Yes.

The Court: The depositions will be admitted.

(Thereupon there were read in evidence the depositions of five witnesses, to-wit, W. M. Clayborne, W. E. Pearsall, Walter Bartlett, W. B. Mullins, and W. L. Pfifer; and during the reading of said depositions certain interruptions, objections, rulings of the Court, exceptions, and proceedings were had (same being shown without quotation marks), all as shown by the following, to-wit:)

Deposition of W. M. Clayborne

"W. M. Clayborne, of 719 Cypress Street, North Little Rock, Arkansas, occupation Conductor for the Missouri Pacific Railroad Company, of lawful age, being duly sworn, deposeth and saith:

"Questions by Attorney W. L. Curtis:

"Q. How long have you been in the service of the Missouri Pacific?

A. 27 years and 8 months.

[fol. 285] Q. Where were you working in May of 1927?

A. I was working on the Central Division of the Missouri Pacific.

Q. Did you take out as conductor on that date from North Little Rock to Van Buren Extra 1539 in which there were cars MP 51292, 52091, 51572, 52092, and 51143, loaded with stock or cattle?

A. Yes, sir.

Q. Did you get a letter from Mr. Buckminister and Mr. Love, a joint letter; trainmasters, inquiring about the handling of that train that — these particular cars, said letter being dated July 22nd, 1927?

A. Yes, sir.

Q. Did you reply to that letter?

A. Yes, sir.

Q. Have you recently had an opportunity to read your reply?

A. No, sir.

(Reads letter.)

Q. After referring to your letter in connection with the shipment under inquiry, dated July 24th, 1927, I will ask you if there was any rough handling of these cars of cattle between North Little Rock and Van Buren?

A. No, sir."

"The Plaintiff objects to the question and answer and asks that they be stricken from the record for the reason that the question calls for a conclusion of the witness, and the answer of the witness is a conclusion based upon writ-[fol. 286] ten reports and not from his memory."

The Court: Objection sustained. I think it is a conclusion.

Mr. Curtis: The defendant desires an exception.

(Reading continued:)

"Q. You stated that you made this written report?

A. Yes, sir.

Q. And that the matter was more recent and refreshened in your mind?

A. Yes, sir. The time this shipment was handled some time ago and I would not remember from memory and is made from reports.

Q. Were there any dead animals in either one of these five cars at the time the shipment reached Van Buren that you handled?

A. No, sir. I remember that I never do unload any stock en route and I can remember that we never had any on arrival there."

(The following cross-examination was read by Mr. Moreland:)

"Questions by Mr. Moreland:

"Q. How long did it take to make the trip from Little Rock to Van Buren?

A. Ordinarily with a stock run we make it in nine or ten hours.

[fol. 287] Q. Were there any stops made between here (Little Rock) and there?

A. Yes, sir, there were several stops but I could not tell how many.

Q. How many cars did you have in that train, if you recollect? Approximately?

A. I do not remember exactly how many we had on that date, but around 70 or 80 cars, or somewhere in that neighborhood. There are times when we might not have had over twenty cars, but if we had a train we had between 70 and 80 cars. That would have to be gotten from the 2704 report—that shows the number of empties and loads.

Q. Did you make a particular inspection of these cattle cars when you got to Van Buren as to whether or not any of them were dead?

A. Yes, sir. We go to the head end and look the cattle over. That is our business to make a report of it.

Q. You say there were none dead at that time?

A. No. I know for this reason, that I never did have any dead handled to Van Buren. I have seen some cattle down but not dead.

Q. Do you know who your engineer was that day?

A. No, sir. I cannot recall who the engineer was.

Q. Was it the regular engineer or not?

A. I do not remember, but it should have been Ed George.

He was the regular man on that engine at that time.

[fol. 288] Q. Were any of the cattle down when you got to Van Buren?

A. Yes, there were some of them down.

Q. Did you notice them down before you got to Van Buren?

A. Well, I could not say exactly but all cattle that we handle that way are more or less down at all times, merely resting and some of them are down from being weak.

Q. Did you inspect the shipment any between Little Rock and Van Buren?

A. Well, every time I passed the cattle as I was going to the head end or around the head end I examined them.

Q. Do you recall specifically whether you made any particular inspection of these cattle or not?

A. Well, I could not say positively. I just made a passing inspection of the cattle as I would go by and see how they were.

Q. Mr. Clayborne, do you know how these trains are handled after they arrive at Van Buren; are they switched in the yards there or do they go through to their destination in the manner they are made up in Little Rock?

A. Ordinarily the cattle are placed in the head end of the train. They might pick that up and set it on another track or they might reduce the train from the rear end, but as an ordinary thing there is usually some switching done with these trains and changes made.

[fol. 289] Q. They change engines there?

A. Yes, sir.

Q. And change crews?

A. Yes, sir."

(Deposition of W. E. Pearsall.)

"W. E. Pearsall, residence 1721 Maple Street, North Little Rock, Arkansas, of lawful age being duly sworn, deposeth and saith:

"Questions by Attorney W. L. Curtis:

"Q. What is your business?

A. Conductor.

Q. For what Company?

A. The Missouri Pacific Railroad Company.

Q. How long have you been with the Missouri Pacific Railroad Company in that capacity?

A. As Conductor?

Q. Yes.

A. Since 1901 when I was promoted in February. Have been working for them thirty-four years as brakeman and conductor.

Q. I will ask you if you handled Extra 1542-1487 between North Little Rock and Van Buren on May 7th, 1927, in which cars MP 51198 and MP 51490 were loaded with stock?

A. Yes, sir. I am giving this from my record and I know that is true.

[fol. 290] Q. Did you get a joint letter from Mr. Buckminister and Mr. Love, Trainmasters, making inquiry with reference to this shipment? Said letter dated July 22nd, 1927?

A. Yes, sir.

Q. Did you reply to that letter?

A. Yes, sir.

Q. Have you recently had an opportunity to read your reply?

A. Yes, sir, a few moments ago.

Q. I will ask you if your train on that trip in which these two cars of cattle were being carried received any rough handling while in your charge?"

Mr. Curtis: That is objected to by Counsel for plaintiffs.

The Court: Objection sustained.

Mr. Curtis: The defendant excepts.

(Reading continued:)

"Q. The written memorandum that you refer to is a memorandum made by yourself?

A. Yes, sir.

Q. At a time when you had a personal recollection of the movement of this stock?

A. Yes, sir.

Q. And was it a correct memorandum?

A. Yes, sir.

Q. Were there any dead animals removed from these two cars while in your charge?

[fol. 291] A. No, sir."

Mr. Curtis: Now, we think that in view of the witness' later explanation there, this question was admissible as to whether there was any rough handling or not.

The Court: Overruled; I will let him answer.

Mr. Moreland: We object for the reason that it calls for a conclusion. Let him state how they were handled, and let the jury determine.

The Court: Well, that is a question for the jury to determine. Of course, in my judgment, it is a conclusion.

Mr. Curtis: Well, from the railroad parlance, or in the language of the railroader, I don't think it is. If there is no movement of the train out of the ordinary, there is no rough handling of the train, from the railroader's viewpoint.

The Court: Well, he could state that in his answer, that there was nothing out of the ordinary. That answer, as given, is partially a conclusion of the witness.

Mr. Curtis: We desire an exception. The next here (indicating in deposition) is "Questions by Mr. Moreland." Do you want to read this, Mr. Moreland?

Mr. Robson: As I understand, those are the two first [fol. 292] cars that went through and there was no damage to them, and there is no dispute on them, as I understand that, Mr. Curtis——

Mr. Curtis: Well, I think the records will show that one or two head were down or dead, or something, in that.

Mr. Robson: Well, go ahead, then.

Mr. Moreland: I will read that, then.

(Thereupon the cross-examination was read by Mr. Moreland, as follows:)

"Questions by Mr. Moreland:

"Q. What was the date on which this train was handled, Mr. Pearsall?

A. May 7th, 1927.

Q. And what was the date of the written report of this matter?

A. July 26th, 1927.

Q. You have not had occasion to refer to this matter since that time, have you?

A. I have not.

Q. And the testimony that you are giving here is based upon your written report as you read it and remember it now?

A. Yes, sir. If there is any exceptions during the trip of stock down or dead I have a little memorandum book and note the exceptions in it, and if I pick up cars with [fol. 293] notations on the way-bills I put that on my memorandum book and I know there were no exceptions noted or it would have been in the book.

Q. How many cars did you have in the train on that date, Mr. Pearsall, approximately?

A. I cannot recall now just how many we had. You know we do not keep that in our books.

Q. Who was your engineer?

A. I do not recall. I do not have that memorandum book. The 2704 report would show that.

Q. How long did it take you to make the trip from Little Rock to Van Buren?

A. It varies. Usually we make the trip with a stock train quicker than we do freight (dead). The trip with stock trains would run from nine to eleven hours.

Q. Do you have any recollection about this particular trip?

A. No, sir.

Q. Were there any dead animals when you reached Van Buren, in the cars?

A. No, sir, none that I know of. At Van Buren we go to the yard office and register and go up in the yards.

Q. I take it you did not make any inspection of these two cars on that date when you arrived at Van Buren?

A. Not at Van Buren yards. I make inspections when we stopped. They are inspected at water tanks and regular stops.

[fol. 294] Q. Mr. Pearsall, do you know how these trains are handled at Van Buren? that is, are they handled through as they are made up, or whether they break them up and switch them around?

A. My observation at Van Buren is that stock is mostly put on the head end of the train nearest the engine. The switching is usually done from the rear end of the train, except in some few instances. Some few instances in the handling of the red ball freights they put two engines on them, but usually stock are set over on another track. They

are mighty good about that in Van Buren. They have a good yardmaster up there and I know they usually do that.

Q. Mr. Pearsall, are you instructed to examine these trains before you leave them at Van Buren or not?

A. No, sir, we are usually in a hurry to get out on time.

Q. Do you have instructions to that effect?

A. Of course, coming south we get cattle or mules I go down to the engineer and deliver the orders, I pass by the cars and look at them to see if they are all right or if any of them are down, etc."

(Deposition of Walter Bartlett)

(Reading by Mr. Curtis.)

"Walter Bartlett, residence 2601 Lincoln Ave., North [fol. 295] Little Rock, Arkansas, of lawful age, being duly sworn, deposeth and saith:

"Questions by W. L. Curtis:

"Q. What is your busines, Mr. Bartlett?

A. Stock yard foreman for the Missouri Pacific Railroad Company.

Q. How long have you been with the company in that capacity?

A. Over fifteen years.

Q. I will ask you if you were on duty in looking after live stock shipments for the Company in May of 1927?

A. Yes, sir.

Q. I will ask you if you handled four cars of cattle that came in on the Missouri Pacific Railroad Company from Malvern, Arkansas, on the morning of May 5th, 1927?

A. I did.

Q. Did you make a memorandum or record of the handling of these cars and condition of the cattle at that time?

A. Yes, sir, I did.

Q. Do you have your record with you?

A. Yes, sir. I make that from my record.

Q. I will ask you if car MP 11968 was one of the cars that came in that morning?

A. I do not remember off hand. I will have to refer to my record to refresh my memory. (Produces record.) Answers, Yes, sir.

Q. You may state what the condition of the cattle in [fol. 296] that particular car was at the time of unloading.

A. Cattle were all up on their feet when they were placed for unloading.

Q. You may state as to whether or not said cattle then were all unloaded on foot.

A. Yes, sir, all cattle walked out of the car when unloaded.

Q. I will ask you if you also handled cattle in MP car 14877, MP Car 14825, and MP Car 50011 on the same date?

A. Yes, sir.

Q. What was the condition of all the cattle in car #14877?

A. Four dead and six crippled or down in that car.

Q. What happened to the six that were down?

A. I think the most of them died. I could not be sure, but I think most of them in that car died while they were in the pen.

Q. And what was the condition of the cattle in car #14825?

A. They were all on their feet when unloaded.

Q. And in car #50011?

A. They were all standing when placed for unloading.

Q. Now, what was done with the cattle in all four of these cars after unloading?

A. They were dipped and kept under the supervision of the Government.

[fol. 297] Q. How many cattle were in these four cars under discussion?

A. 11968 I unloaded 80 head, other cars had 83, 63, and 64 respectively.

Q. What, if anything, happened to these cattle after they were dipped?

A. When they were dipped the inspector found them to be ticky, by Inspector Denman. During that time several head died.

Q. How many?

A. I do not know. (After referring to records stated 17 died between dippings.)

Q. I believe you stated there were four dead in car 14877 when the car arrived?

A. Yes, sir.

Q. How many of the cattle which were unloaded from these four cars were loaded out and when?

A. 66 were loaded out in car 11968.

Q. How many were loaded out in car 14877?

A. 61.

Q. And how many in car 14825?

A. 73.

Q. And in 50011?

A. 63.

Q. Now, was there any of them left in the pen that were not dead that were not loaded out?

A. We held five head over account of the cars being [fol. 298] crowded and we put them in another shipment.

Q. But they did go out later on?

A. There were seven head left, but two of them died and that only left five.

Q. These two additional dead, were they counted in the 17 dead?

A. No, sir. That would make 19 dead after they were unloaded and dipped.

Q. How long were these cattle held between dippings?

A. They were dipped on the 5th the first time and on the 12th the second time.

Q. I will ask you if on May 4th, 1927, there was received and unloaded at North Little Rock yards cars SW 58198 and RI 73410 which had been delivered by the Rock Island Railroad Company?

A. Yes, sir.

Q. How many cattle was in car SW 58198?

A. 40 head.

Q. And how many were loaded out?

A. 30 loaded out in 58198 and 43 head in RI 73410.

Q. How many were unloaded from RI 73410?

A. 52.

Q. And how many were loaded out?

A. 43.

Q. Now, what was the condition of the cattle in 58198 at the time unloaded?

A. When placed for unloading one was down in that car. [fol. 299] Q. Do you have any record of what kind of an animal that was, Mr. Bartlett?

A. It was a cow.

Q. Do you remember the color and nature of the injury?

A. No, sir, I remember the cow, but I do not remember the color. It was a fat cow. She seemed to be paralyzed, my record shows. It was the best animal that was in the car.

Q. She appeared to be paralyzed?

A. Yes, sir.

Q. She afterwards died?

A. Yes, sir.

Q. What was the condition of the cattle in car 73410?

A. One cow down in that car and yearling dead when placed for unloading.

Q. What was done with these cattle when unloaded?

A. They were dipped under the supervision of the Government and found to be ticky, held seven days and dipped the second time.

Q. What, if anything, happened to these cattle, or any part of them, between dippings?

A. There were several head died while being held for a second dipping. To be exact, eight head died between dippings.

Q. Then with the cow that was dead when the cars came [fol. 300] in there were nine dead in all out of the shipment before they were loaded out?

A. That would make eleven head.

Q. Now, these last two cars, do you know where this shipment originated?

A. Leola, Arkansas.

Q. I will ask you if you received car RI 77333 from Ladelle, Arkansas, and if so when?

A. Yes, sir, on May 5th, 1927, at 1:30 P. M.

Q. What was the condition of that car of cattle when received?

A. They were all up on foot when unloaded.

Q. How many in the car?

A. 52 head.

Q. And how many of those went out?

A. 52.

Q. Were those cattle dipped?

A. Yes, sir. They were dipped at 4:00 P. M. of the 6th.

Q. Were they held for redipping?

A. No, sir, the Government inspection did not hold them.

Q. Dipped at 4:00 P. M. on the 6th, when did they get out?

A. We loaded them out at 10:50 P. M. on the 6th.

Q. What road did the Leola and Ladelle shipments come in on?

[fol. 301] A. The Leola shipment was received over the Rock Island. I could not say which road the Ladelle shipment came in over, but it came in over some other road than the Missouri Pacific."

(Cross-examination read by Mr. Moreland.)

"Questions by Mr. Moreland:

"Q. Mr. Bartlett, how many men do you have working under you out there?

A. I could not say.

Q. Approximately?

A. I have three men all the time and when we have extra shipments I get extra men.

Q. Now, you have been testifying from your records, have you not?

A. Yes, sir.

Q. You have no memory of this matter other than that?

A. I remember about the fat cow. Just about the ordinary load of cattle I would not remember.

Q. How many loads of cattle did you handle on that date?

A. On May 5th?

Q. Yes.

A. We unloaded 10 loads of cattle.

Q. Do you keep these records yourself, now, or do some of the men working under you keep them?

[fol. 302] A. I keep them.

Q. Did you see every one of these cars that came in?

A. Yes, sir.

Q. Did you see all of the cattle that came out of them?

A. Yes, sir.

Q. You then made this report from your own personal investigation of these cars?

A. Yes, sir.

Q. Now, whose pens were these cattle unloaded in?

A. Whose what?

Q. Cattle pens.

A. Missouri Pacific.

Q. Were they kept in these pens until they were shipped out again?

A. Yes, sir.

Q. You fed them and took care of them?

A. Well, I was thinking about that yesterday since the man was over to see me the other day, and I was trying to remember whether Mr. Raney who was there with the cattle fed them part of the time or not. I do not remember.

Q. Who dipped them, or did the Government do that?

A. We dipped them under the supervision of the Government Supervisor.

Q. Was the inspector there when this was done?

A. Yes, sir.

[fol. 303] Q. In other words, the Missouri Pacific employes dip them under the Government supervision, is that correct?

A. Yes, sir.

Q. What do you mean by the Government Supervision? What does their man do?

A. I do not know what you would call it. I can explain it this way. When a car of cattle is to be dipped we take it and put it in the inspection chute. He examines the cattle for ticks and he says all right go ahead and dip that one and we do so, and keep on.

Q. Now, when the Government inspector has inspected the cattle and orders them dipped you proceed to dip them?

A. Yes, sir.

Q. Whose dipping pen or vat is used?

A. At that time Mr. Ed Watson had the dipping vat.

Q. Who makes up the solution that was in there?

A. The Government inspector.

Q. Your men then put them through and take them out and he determines whether or not they need a second dipping?

A. Yes, sir.

Q. You hold them here in the Missouri Pacific pens between dippings and then load them out?

A. Yes, sir.

Q. Were all of these cattle loaded out at the same time, Mr. Bartlett?

[fol. 304] A. Two loads from Leola were loaded out at 2:45 A. M. on the 13th and four loads from Malvern were

loaded out at 2:45 A. M. on the 13th, and car from Ladelle loaded out at 10:50 P. M. of the 6th.

Q. Did two cars of this Malvern cattle go through after the first dipping without the second dipping?

A. I know that the Ladelle car and one of the Malvern cars went through after the first dipping.

Q. Those men that work for you over there at the stock pens, are they white men or negroes?

A. Negroes."

(The following questions read by Mr. Curtis:)

"Questions by Mr. Curtis:

"Q. Question of whether or not stock was to be dipped and the time of release of same, is that under supervision of the Railroad or if it is considered by the Government inspector?

A. If the cattle originates from a ticky or quarrantined area, the Government inspector has to say.

Q. Was all of these shipments from a ticky or quarrantined area?

A. Yes, sir."

(The following was read by Mr. Curtis:)

(Deposition of W. B. Mullins)

"W. B. Mullins, of lawful age, being duly sworn, deposes. [fol. 305] and saith:

"Questions by Mr. Curtis:

"Q. Where do you live, Mr. Mullins?

A. Gurdon, Arkansas.

Q. What is your business?

A. Conductor for the Missouri Pacific Railroad Company.

Q. How long have you been serving the company in that capacity?

A. Since 1911.

Q. Did you handle train from Malvern to Little Rock, Arkansas, which had in its consist MP Cars #11968, 50011, 14877, and 14825?

A. Yes, sir.

Q. What time did that train pick up the cars in question?

A. We arrived at Malvern at 1:00 o'clock in the morning and departed from there at 4:10.

Q. What time did you reach Little Rock?

A. Do you want the entire delays?

Q. We want the general time.

A. We tied up at North Little Rock at 9:45; we arrived at Union Depot at 7:15 A. M.

Q. What do you mean by the Union Depot?

A. That is, the track of the freight main—15 and 16.

[fol. 306] Q. Was there any rough handling of these cars, or of your train"——

(Interruption.)

Mr. Robson: We object to that as repetition.

Mr. Curtis: Wait a minute now.

(Reading:)

"Q. Was there any rough handling of these cars, or of your train during the time that these cattle were being moved from Malvern to North Little Rock?"

Mr. Robson: We object to that as repetition.

Mr. Curtis: There was no objection made at the time the question was asked, here in the deposition.

Mr. Robson: It doesn't have to be, I don't think.

The Court: Was there any objection made there in the deposition (indicating)?

Mr. Curtis: No, sir.

The Court: I rather think you would have to interpose them at that time. You were there present. What does the stipulation say as to that?

(Discussion among counsel as to objections and as to the stipulation.)

The Court: Of course, if you stipulate that you can raise objections at the trial, it would not have to be raised at the time of the taking of the depositions; but, in the absence of [fol. 307] a stipulation to that effect, I think it would have to be raised at that time.

Mr. Robson: Your Honor, if there is no stipulation to the contrary, there is no provision of law or statute which requires you to make objections to a deposition at the time

it is taken; it is not evidence and does not become evidence until it is offered at the trial, and then you can make your objection at that time. That has always been my idea.

The Court: My idea has always been that, if an attorney was present when the depositions were taken and did not interpose objections, it is too late at the trial. That is my construction of it. The objection will be overruled.

Mr. Robson: Exception.

(Reading continued.)

"A. No, sir.

(The cross-examination was read by Mr. Moreland.)

"Questions by Mr. Moreland:

"Q. They were in your possession approximately then four or five hours?

A. From one to 4:10. We picked them up between that time.

Q. How far is it from Malvern to North Little Rock?

A. 45 miles.

Q. How many stops did you make between Malvern and the time you tied up in North Little Rock?

[fol. 308] A. According to my 2704 report we did not make any stops. If we had made a stop to exceed ten minutes my 2704 report would show it. We left Malvern at 4:10, reached Union Depot at 7:15 A. M. That was the first stop out of Malvern.

Q. You could have made stops along of less than ten minutes duration and your 2704 report would not show it?

A. You see at that time we had a good deal of slow track around the Saline River Bottoms on account of washouts, but we did not make any stops more than to slow down account of slow track.

Q. Did you have any trouble with that shipment on that trip such as side swiping cars at Butterfield?

A. I have never been at Butterfield. It is not on our line.

Q. I beg your pardon, I must be mistaken. Q. Now, was this train that you brought in from Malvern to Little Rock in which these cars of cattle were brought, was that train switched in the yards at Little Rock?

A. I do not know. I could not say how they were handled after 8:30, that is when we left it in East Little Rock.

Q. Are you the man that passed up some cattle at Malvern at that time, or did you get all of the cattle that was there?

[fol. 309] A. Yes, sir, I got all that was there at that time. I picked up six cars there—there were two cars of brick and four cars of cattle and had fifty cars in the train into Little Rock."

(Thereupon Court recessed for a few minutes, as shown, by the following:)

The Court: Gentlemen of the jury, I am going to permit you to have a short recess, under the usual admonition of the Court not to discuss the case, or any subject connected with it, either among yourselves or with any one else, and not to form or express an opinion until you have heard all of the evidence, the instructions from the Court, and the argument of counsel. We will take a recess for about five minutes.

(Court recessed for five minutes, at the end of which time it duly reconvened with all court officials present, all the jury present, and the parties and attorneys in this case present as before, and thereupon the deposition of W. L. Pfifter was read on behalf of the defendant, as shown by the following:)

(Deposition of W. L. Pfifer)

"W. L. Pfifer, of lawful age, being duly sworn, deposeth and saith:

"Questions by Mr. Curtis:

"Q. Where do you live, Mr. Pfifer?

[fols. 310-329] A. 5118 West Markham Street, Little Rock, Ark.

Q. Where did you live in May of 1927?

A. Leola, Arkansas.

Q. What was your business there?

A. Agent for the CRI&P.

Q. Is this your signature on this paper (produces paper)?

A. It is.

Q. Were you agent for the Rock Island at Leola at the time it was executed?

A. Yes, sir.

Q. Was it signed by Mr. S. E. Henry at that time as the shipper?

A. Yes, sir.

Q. We now desire to offer the paper which is the triplicate original copy of uniform live stock contract under which car, initial RI 73410 and SW 58198 moved from Leola to Little Rock, Ark., on May 3rd, 1927. Are there any objections?"

(Still reading from deposition:)

"(There were no objections on the part of Atty. Moreland.)"

"We now ask to have it marked Exhibit One to be attached to witness' deposition as a part of same."

(Thereupon said Exhibit One to deposition was introduced in evidence, as shown by the following:)

Mr. Curtis: We offer it now.

The Court: It will be admitted.

. . . . . .

[fol. 330] (Thereupon the reading of the deposition of W. L. Pfifer was resumed as follows:

"Q. I note endorsed on this contract the following: 'Exceptions, 8 head poor weak cattle in SSW 58198, and 10 head poor weak cattle in RI 73410, shipper responsible for feeding, etc., while held over at North Little Rock, Ark. to be dipped Thursday May 5th, 1927.' Was that notation placed on the contract before it was signed?

A. Yes, sir.

Q. Out of the two shipments there would be 18 head that were poor, weak cattle as noted on the contract?

A. Yes, sir.

Q. What was the general condition of the remaining portion of said shipment?

A. Well, of course I have so many in there I do not remember the condition except those noted.

Q. There is another notation after the number of head in car and that is 'Stocker Cattle.' What did that signify?

A. Let me see, there is something in the tariff that affects the rate, I think, but I do not remember just what it is."

(The cross-examination was thereupon read by Mr. Moreland.)

"Attorney Moreland takes the witness:

"Q. When these cattle were shipped down there did you [fol. 331] deliver a copy of your bill of lading to the conductor in charge of the train?

A. To the Conductor?

Q. Yes.

A. Yes, sir, it was given to the person in charge.

Q. What record of that shipment is given to the train crew?

A. He gets a way bill.

Q. Does it contain the same information that it does?

A. Well, not necessarily always, no.

Q. Now, this eighteen head of cattle that you have marked up as poor weak cattle, did you consider them so poor and weak that they should not be shipped?

A. No, I do not consider that they were. It meant that they were likely to get down in the car.

Q. The rest of the shipment in the two cars you considered able for shipment?

A. Yes, sir."

(Thereupon the following questions were read by Mr. Curtis:)

"Mr. Curtis takes the witness:

"Q. I notice on the back of this blank form to be signed by the party accompanying the shipment, is the name of Dan Rana. Is he the fellow that was in charge of the cattle?

A. If he signed it he was in charge of the cattle.

Q. Do you recollect Mr. Butler having signed this form [fol. 332] in the presence of the accompanying party?

A. Yes, sir."

(Note.—This was the end of the deposition proper. Thereupon the following stipulation, immediately following the foregoing deposition, was read by Mr. Curtis:)

"Stipulation

"It is hereby stipulated by and between the Attorneys for both plaintiff and defendant that the Uniform Live Stock Contract offered and admitted in evidence, as to each of the cars of cattle in question, was at the time of the execution of same published and on file with the Interstate Commerce Commission, and that the same may be used in this case without being formerly certified by the Secretary of the Interstate Commerce Commission."

"Robson & Moreland., W. L. Curtis, Atty. for Deft."

(Conclusion of Depositions of Clayborne, Pearsall, Bartlett, Mullins, and Pfifer.)

(Thereupon Depositions of two additional witnesses, F. C. Ashley and H. C. Ward, were introduced and read in evidence, as shown by the following:)

[fol. 333] Mr. Curtis: We next offer in evidence the depositions of F. C. Ashley and H. C. Ward, taken at Van Buren. Evidently they were taken on the 10th of August, 1928, as shown by the agreement (indicating).

The Court: They will be admitted.

(Thereupon the reading of said depositions was commenced by Mr. Curtis.)

(Deposition of F. C. Ashley)

"F. C. Ashley, of lawful age, being duly sworn, deposeth and saith:

"Q. State your name.

A. F. C. Ashley.

Q. Where do you live?

A. Van Buren.

Q. What is your business?

A. I am a Conductor on the Missouri Pacific.

Q. How long have you been with the Missouri Pacific in the capacity of Conductor?

A. Since 1901.

Q. Did you handle Extra Freight No. 160?

A. Yes.

Q. Did you have 2 cars of cattle in that train?

A. Yes, sir.

Q. Where did you set out the cattle?

A. Unloaded at Delaware. They were originally billed [fol. 334] to Nowata, and the man in charge asked me if we could take them to Delaware and have them unloaded at Delaware as cattle were in weak condition and it was handier for them to unload them at Delaware. Would not have as far to drive. I wired dispatcher's office at Van Buren to get permission to take them to Delaware. Herewith is a copy of message I received. 'If the cattle you have for Nowata are from Malvern, Ark., take them to Delaware. Advise, signed W. W. R.'

Q. Was your train in any trouble or any rough handling of same between Van Buren and Delaware?

A. No, sir. Gave them a fine run.

Q. Was there any downs or deads between Van Buren and Delaware?

A. No, sir. I have my notation here that I made out leaving Van Buren. 'F. L. H. and General Yardmaster, R-135. No. 160 has MP 51490 and MP 51198 cattle from Malvern, Ark. and No. Little Rock to Dow Rana, Nowata, Oklahoma. reloaded No. Little Rock, 10:45 P. M. and 11:50 P. M. 5th and 6th, released 36 hour man in charge.' Then I have a notation here I made on this message 'One dead yearling when received by me at Van Buren, 5th and 7th 2:39 P. M.' Then I have a notation on the corner here 'Very weak and gaunt when received.'

Q. Copies of these telegrams and notations made — you at the time you received the cars and from personal inspection of the cars?

[fol. 335] A. Yes."

(Cross-examination was read by Mr. Moreland.)

"Cross-examination by Mr. Moreland:

"Q. Were any of these cattle down when you received them at Van Buren?

A. Some of them were laying down and one was dead.

Q. Had these cars been switched in the Van Buren yards in making up your train, or do you know?

A. I don't know.

Q. About how many hours did it take to make the run from Van Buren to Delaware, approximately?

A. I left here (Van Buren) at 2:00 P. M. and arrived Coffeyville 2:15 P. M., making it at Delaware about 1:15 P. M.

Q. How many cars did you have in the train that day?

A. I had 55 cars out of Van Buren and I picked up 38 at Oologah.

Q. Now, these 38 cars you picked up at Oologah, did you put them at the head end or rear end?

A. We keep the stock at head end of train at all times.

Q. Then these 38 cars that were picked up at Oologah were placed right behind the stock?

A. Yes, sir.

Q. You did the switching that was necessary to pick up [fol. 336] these 38 cars at Oologah, didn't you?

A. Yes, sir.

Q. How many stops did you make between Van Buren and Delaware that you know of on that trip?

A. Only one as I remember and that was at Nowata.

Q. Did you have any cattle down in the cars when you set them out at Delaware?

A. They were all all right except the one dead one."

(Thereupon the direct examination of H. C. Ward was read by Mr. Curtis.)

(Deposition of H. C. Ward)

"H. C. Ward, being called as a witness and after being sworn, testifies:

"Q. What is your name?

A. H. C. Ward.

Q. Where do you live?

A. Van Buren, Ark.

Q. What is your business?

A. Railway Conductor for the Missouri Pacific.

Q. How long have you been with the Missouri Pacific as Conductor?

A. Since August, 1906.

Q. Did you handle train No. 160 out of Van Buren North [fol. 337] on May 13, 1927, in which there was 5 cars of cattle?

A. Yes, sir. Also 2 cars cattle for South Coffeyville.

Q. Was train in any trouble or was there any rough handling between Van Buren and Delaware?

A. No, sir.

Q. Was there any downs or deads when you reached Delaware in the Delaware cars?

A. If I remember correctly cattle were in poor condition and we found several down and some dead when shipment unloaded at Delaware. Notations were made by myself and Agent at Delaware. However, my records have been destroyed by accident to caboose and its destruction in November, 1927."

(Following cross-examination was read by Mr. Moreland:)

"Cross-examination by Mr. Moreland:

"Q. Was your train made up here in the yards at Van Buren, Mr. Ward?

A. Yes.

Q. Were there any cattle down or dead in the cars at the time you took charge of the train?

A. There is no record to my knowledge.

Q. How big a train did you have on trip up there, Mr. Ward?

A. Train consisted of 43 loads 13 empties, 2405 actual, 2795 adjusted tons, handled by Engine 1486 and 1253 [fol. 338] double-heading. No changes in train between Van Buren Yard and Delaware.

Q. Did you make any stops, Mr. Ward, between Van Buren and Delaware?

A. Yes.

Q. How many, if you recall?

A. Well, I couldn't say how many. We had necessary stops between the two stops. Coal and water and crossing stops.

Q. Was this train double-heading, you say?

A. Yes, sir.

Q. Were you present when these cattle were unloaded at Delaware?

A. Yes, sir.
Q. Were there any cattle down or dead at that place?
A. If I remember correctly, yes.
Q. Did you actually see them unloaded at that place?
A. Yes.
Q. Were some of those cattle down in such shape they had to be helped out of the car?
A. Yes, sir."

(Depositions of Ashley and Ward concluded.)

(Thereupon the Defendant, for additional testimony and evidence on its behalf, produced certain witnesses who were duly sworn and who gave oral testimony, as shown by the [fol. 339] following:)

R N. GALATIAN, being called in person as a witness on behalf of the defendant and being first duly sworn according to law, testified as follows, to-wit:

Direct examination.

By Mr. Curtis:

Q. You were sworn, were you, Mr. Galatian, with the other witnesses this morning?
A. Yes, sir.
Q. Where do you live?
A. Delaware, Oklahoma.
Q. How long have you lived there?
A. Five years and six months.
Q. What is your business up there?
A. I am the Agent for the Missouri Pacific.
Q. How long have you been with the Missouri Pacific?
A. Nine years in October.
Q. Have you had an agency during that entire time ——
A. Yes, sir.
Q. — or just part?
A. Yes, sir.
Q. Were you on duty in May, 1927, when there was five cars of cattle set out at your station?
A. I was Agent up there. That wasn't during my hours of service that they arrived, though.

[fol. 340] Q. Was the arrival of the cattle at that time called to your attention?

A. Well, it was understood that they would be there some time that night, but I didn't know exactly what time that would be, when I was off duty at three o'clock, and they was to call me when the cattle arrived.

Q. Well, were you later called?

A. Later, yes, sir.

Q. Either that day or the following day?

A. Yes, sir.

Q. At what hour and on what day?

A. Well, Mr. Hartley came over there—that was about six—it must have been five o'clock. It was real early in the morning—the helper went and ——

Q. What day of May was that?

A. I can tell by looking at my (witness examines some papers)—on the 14th—May 14th.

Q. Did you go over there to the pens then, that is, to the station?

A. I went over to the pens to—I went over to the pens to see about the water and see how the condition of everything was then, and then I went to work at six o'clock—I went on duty at six o'clock then.

Q. Well, did you see the cattle after you went on duty then at six o'clock?

A. Yes, sir.

[fol. 341] Q. What condition did you find the cattle in?

A. They were in very poor and weak condition—the biggest majority of them were.

Q. Did you see any deads or downs?

A. There was ten dead—removed from the car.

Q. Ten dead?

A. Ten dead removed—there was—I believe it was ten dead removed from those five cars (witness refers to papers)—there was ten dead ones from those five cars.

Q. Was there any downs?

A. And there was more-or-less a bunch of them lying around—tired from the trip, you know. They—the biggest part of them, though, was—got up when they was driven out, but some of them never did get off of the ——

Q. Never did get on their feet any more?

A. Some of them got on their feet—we helped them on their feet to get them out, thinking maybe they could make

ll, but there was some—I don't know just the exact number that were down in the drive away from the pens to the highway—I don't know about that number, because I had already counted them out of the pens.

Q. Do you know whether they had to haul any of them away from Delaware or not?

A. I never seen them. I understood they did haul some of them away.

Q. You didn't assist them, though?

A. No, sir.

[fol. 342] Q. You don't know about the number?

A. No, I don't.

Q. But all of them got out of the pens when you checked them out, except the ten deads?

A. Yes, sir, out of those five cars.

Q. Out of that five cars? Now, had there been a couple of cars came in there a day or two earlier than that, or a few days earlier than that, to the same parties?

A. On May 8th, yes, sir.

Q. To Mr. Hartley—they belonged to Mr. Hartley?

A. Yes, sir.

Q. What time of day did you see those cattle first?

A. Well, owing to the fact that I get so many cattle in up there—quite a bit of pasture cattle and I am called at all hours of the night—I don't hardly—I couldn't hardly answer that question. There is so many cases where that I have to get up during the night and unload cattle that it would be kind of hard to remember any particular case. But I knew the cattle was there—I couldn't say whether I went over there and unloaded those cattle or not—the first two cars.

Q. Now, do you know whether there was any deads or downs in those two cars?

A. Yes, I know there was two dead.

Q. Two dead in that shipment?

A. In that shipment.

Q. What was their condition—can you recall what the [fol. 343] condition of the other cattle constituting this shipment——

A. The first two cars—cattle seemed to be in quite a little better condition than the last five cars were. However, they were all—all of them—they didn't look like extra fat cattle to me. They were——

Q. —All more-or-less thin, were they?
A. Yes, sir, more-or-less thin.
Q. Regular stocker——
A. Yes, sir, regular stocker cattle.
Q. Range cattle?
A. Yes, sir, range cattle.

Mr. Robson: Your Honor, we object to Counsel leading the witness.

Mr. Curtis: All right.

The Court: Go ahead.

By Mr. Curtis:

Q. Now, did you check out the five cars, especially, that came in on the 14th there? Did you check those cattle out with Mr. Hartley and get a receipt for them?
A. Yes, sir.
Q. Was there more than one receipt?
A. Yes, sir.
Q. Have you those receipts with you?
A. Yes, sir, I have.
Q. Let me see them.

(Witness produces some papers.)

[fol. 344] A. That (indicating and handing papers to Mr. Curtis) is the receipts on the five cars.

Q. I now hand you this paper (handing paper to witness) and ask you what that is.

A. It is a delivery receipt—for a shipment of cattle consigned to Dow Rana, consisting of fifty-two head of cattle. The car number is Missouri Pacific 51143.

Q. Is that the receipt for one of the five cars that you have just been testifying about?

A. Yes, sir.

Mr. Curtis: I ask to have that (handing paper to reporter) marked for identification.

(The paper handed to reporter was marked Defendant's Exhibit "4" for identification.)

Mr. Curtis: And we offer the Defendant's Exhibit "4" in evidence.

Mr. Moreland: We object to it as being incompetent, irrelevant and immaterial and not tending to prove or disprove any issue in the case. I want to ask a few questions.

Questions by Mr. Moreland:

Q. Is this the original of your records up there, Mr. Galatian?

A. Yes, sir.

Q. Is this a carbon copy in itself?

A. Well, when we make freight bills, we make them—[fol. 345] with the freight bill as an original—and a delivery receipt is a copy of the freight bill.

Q. Now, whom does the original go to?

A. To the consignee.

Q. And you keep the duplicate?

A. Yes, sir.

Q. And the duplicate is supposed to show the same thing that the original shows?

A. Yes, sir, outside of the signature for the——

Q. Who signed this at that time?

A. It shows Mr. Hartley's signature on there (indicating)—no, Dow Rana's signature.

Q. You say Dow Rana signed that at that time? Did Mr. Rana sign it at that time?

A. I believe Mr. Hartley signed the biggest part of those bills there, and some of them he signed "Dow Rana" by him, and some of them he left off the "by."

The Court: What is your purpose in that, Mr. Curtis?

Mr. Curtis: The purpose is to show that they were signed up for, and the number of cattle from each car; and the receipt is to show that they were received in good order—the number of cattle set out as received.

The Court: Objection overruled; it will be admitted.

Mr. Moreland: Exception.

(Said Defendant's Exhibit "4," introduced in evidence, [fol. 346] is, together with all endorsements and notations thereon, in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT "4"

Form 1151-2. 500M-1-27

Missouri Pacific Lines

Delivery Receipt

Delaware, Okla., Station, May 14th, 1927.

Consignee: Dow Rana. Freight Bill No. E27.
Destination: ——.
Route (Point of origin to destination): RI., Little Rock, Mo. Pac.

Received of Missouri Pacific Railroad Co. the following property:
Way-billed from Leola, Ark. Way-bill date and No: May 4th, R3. Full name of shipper: Dow Rana. Car initials and No.: M. P., 51143. Point and date of shipment: ——. Connecting line reference: ——. Previous way-bill references: ——. Original car initials and No.: R. I. 73410.

Number of packages, articles and marks	Weight	Rate	Freight	Advances	Total
52 head cattle Stocker)	20,000	32½	65.00		65.00

Total Prepaid: $——. Total to Collect: 65.00.

[fol. 347] Received in good order for account consignee 5-14-27, 192-.

Signature: Dow Rana.

This is a receipt for delivery of freight and does not indicate the payment of charges. To be filed in pro. no. order.

(Defendant's Exhibit "4" concluded).

Direct examination resumed.

By Mr. Curtis:

Q. I will ask you what that is (handing another paper to witness).

A. That is a delivery receipt—Missouri Pacific 51572, eighty-three head of cattle billed, and there was five dead in that car at the destination.

Mr. Curtis: We desire to have that paper (handing paper to reporter) marked as Defendant's Exhibit "5" for identification.

(The instrument handed to reporter was marked as requested.)

Mr. Curtis: We now desire to offer the instrument marked Defendant's Exhibit "5" in evidence.

Mr. Moreland: We object to it as being incompetent, irrelevant and immaterial, and not tending to prove or disprove any issue in the case.

[fol. 348] The Court: Objection overruled; it will be admitted.

Mr. Moreland: Exception.

(Said Defendant's Exhibit "5", introduced in evidence, is, together with all notations and endorsements thereon, in the words and figures following, to-wit:)

DEFENDANT'S EXHIBIT "5"

Form 1151-2. 500M—1-27

Missouri Pacific Lines

Delivery Receipt

Delaware, Okla., Station, May 14, 1927.

Consignee: Dow Rana. Freight Bill No. 70

Destination: ——

Route (Point of origin to destination): Mo. P.

Received of Missouri Pacific Railroad Co. the following described property:

Way-billed from Malvern, Ark. Way-bill date and No.: May 4th, 46. Full name of shipper: Sam Henry. Car initials and No.: M. P. 51572. Point and date of shipment: ——. Connecting line reference: ——. Previous way-bill references: ——. Original car initials and No.: M. P. 14877.

[fol. 349]

Number of packages, articles and marks	Weight	Rate	Freight	Advances	Total
83 head cattle (stocker)	20,000	29½	59.00	1.00	60.00

CKS 5 dead when unloaded at dest'n. 5-14.
OS&D 34.
Total Prepaid: $—.
Total to Collect: 60.00.

Received in good order for account consignee 5-14-27. 192-.

Signature: Dow Rana.

This is a receipt for delivery of freight and does not indicate the payment of charges. To be filed in pro. no. order.

(Defendant's Exhibit "5" concluded.)

Questions by Mr. Moreland:

Q. What kind of cattle did you say this (indicating) indicated as having been delivered up there? How did you describe them?

A. Some of them was billed as native stock cattle, and some of them was billed as stocker cattle. I had nothing to do with the billing of those.

Q. I see. You received this (indicating) there the same night—at the same time you took the freight receipt?

[fol. 350] A. That is an exact copy of the way-bill as it was received.

Q. What way-bill?

A. With the station and the date notation right there (indicating.)

Q. Is it an exact copy of the freight receipt?

A. Yes.

Direct examination resumed:

By Mr. Curtis:

Q. I will ask you what that is (handing witness another paper).

A. That is another freight bill—covering forty head of cattle from Leola, Arkansas, Missouri Pacific 52092, and there was one dead in that car.

Q. What is the date of that?

A. May the 14th.

Mr. Curtis: We desire to have that (handing paper to reporter) marked for identification as Defendant's Exhibit "6."

(The paper referred to and handed to reporter was marked as requested.)

Mr. Curtis: We desire to offer the Defendant's Exhibit "6" in evidence.

Mr. Moreland: We object to it as being incompetent, irrelevant and immaterial, and not tending to prove or disprove any issue in this case.

[fol. 351] The Court: Objection overruled; it will be admitted.

Mr. Moreland: Exception.

(Said Defendant's Exhibit "6," introduced in evidence, is, together with all endorsements and notations thereon, in the words and figures following, to-wit:)

Defendant's Exhibit "6"

Form 1151-2. 500M—1-27

Missouri Pacific Lines

Delivery Receipt

Delaware, Okla., Station, May 14, 1927.

Consignee: Dow Rana. Freight Bill No. F26.

Destination: ——

Route (Point of origin to destination): R. I., Little Rock, Mo. P.

Received of Missouri Pacific Railroad Co. the following described property:

Way-billed from Leola, Ark. Way-bill date and No. May 4th, R. 4. Full name of shipper: Dow Rana. Car initials and No.: M. P., 52092. Point and date of shipment: ——. Connecting line reference: ——. Previous way-bill references: ——. Original car initials and No.: S. S. W., 58198.

[fol. 352]

Number of packages, articles and marks	Weight	Rate	Freight	Advances	Total
40 head cattle (stocker cattle)	20,000	32½	65.00	——	65.00

Cks 1 dead when unloaded at destn.
O8&D 31 May 14th, 1927.
Total Prepaid: $——.
Total to Collect: 65.00.

Received in good order for account consignee 5-14-27. 192-.

Signature: Dow Rana.

This is a receipt for delivery of freight and does not indicate the payment of charges. To be filed in pro. no. order.

(Defendant's Exhibit "6" concluded.)

Mr. Moreland (addressing witness): Was this receipt here made out at the same time the freight bill was made out up there?

The Witness: Yes, sir, it was made out at exactly the same writing.

Mr. Moreland: And is it an exact copy of the freight bill?

The Witness: It is.

Direct examination resumed:

[fol. 353] By Mr. Curtis:

Q. I will ask you what that is (handing another paper to witness).

A. That (indicating) is a delivery receipt, Missouri Pacific, 51392, fifty-eight head of cattle, showing one dead when unloaded at destination May 14th.

Q. Is that one of the five cars about which you have been testifying?

A. Yes, sir, it is.

Mr. Curtis: We ask to have it (handing paper to reporter) marked Defendant's Exhibit "7" for the purpose of identification.

(The paper handed to reporter was marked as requested.)

Mr. Curtis: And we now offer the Defendant's Exhibit "7" in evidence.

Mr. Moreland: We object to it as incompetent, irrelevant and immaterial, and not tending to prove or disprove any issue in this case.

The Court: Objection overruled; it will be admitted.
Mr. Moreland: Exception.

(Said Defendant's Exhibit "7," introduced in evidence, is, together with all notations and endorsements thereon, in the words and figures following, to-wit:)

[fol. 354] DEFENDANT'S EXHIBIT "7"

Form 1151-2. 500M—1-27

Missouri Pacific Lines

Delivery Receipt

Delaware, Okla., Station, May 14, 1927.

Consignee: Dow Rana. Freight Bill No.: 68.
Destination: ——.
Route (Point of origin to destination): Mo. P.

Received of Missouri Pacific Railroad Co. the following described property:

Way-billed from Malvern, Ark. Way-bill date and No.: May 4th, M 44. Full name of shipper: Dan Hardy. Car initials and No.: M. P., 51392. Point and date of shipment: ——. Connecting line reference: ——. Previous way-bill references: ——. Original car initials and No. M. P., 50011.

Number of packages, articles and marks	Weight	Rate	Freight	Advances	Total
58 stocker cattle	20,000	29½	59.00	1.00	60.00

Cks 1 dead when unloaded at destn.
OS&D 32 5-14.
[fol. 355] Total prepaid: $ ——.
Total to collect: 60.00.

Received in good order for account consignee 5-14-27. 192-.

Signature: Dow Rana.

This is a receipt for delivery of freight and does not indicate the payment of charges. To be filed in pro no. order.

(Defendant's Exhibit "7" concluded.)

Questions by Mr. Moreland:

Q. Who makes out the original of the freight bill that goes with this (indicating)? Did you make that out (handing witness a paper)?

A. Yes, I made that out.

Q. Where did you get the information that goes on the freight bill?

A. From the way-bill that accompanies the shipment.

Q. Is this live-stock contract the way-bill?

A. No.

Q. Do you get any of your information from this live-stock contract (indicating)?

A. No, sir, none whatever.

Q. Is this delivery receipt an exact copy of the freight bill—duplicate copy?

[fol. 356] A. It is an exact copy of the way-bill.

Q. Is it an exact copy of the freight bill?

A. The delivery receipt is an exact copy of the freight bill, yes, sir.

Mr. Moreland: All right.

Direct examination resumed.

By Mr. Curtis:

Q. I will hand you this paper (handing paper to witness) and ask you what it is.

A. It is another delivery receipt.

Q. What is the date of it?

A. May 14th, 1927.

Q. Is that for one of the five cars of cattle that we are inquiring about?

A. It is. It is Missouri Pacific 52094, from Malvern, Arkansas, covering sixty head of cattle, showing three checked dead at destination when unloaded.

Mr. Curtis: We desire to have that (handing paper to reporter) marked as Defendant's Exhibit "8" for identification.

(The paper handed to reporter was marked as requested.)

Mr. Curtis: We now offer Defendant's Exhibit "8" in evidence.

Mr. Moreland: To which we object as incompetent, irrelevant and immaterial and not tending to prove or disprove [fol. 357] any of the issues in the case.

The Court: Objection overruled. It will be admitted.

Mr. Moreland: Exception.

(Said Defendant's Exhibit "8," introduced in evidence, is, together with all notations and endorsements thereon, in the words and figures following, to-wit:)

DEFENDANT'S EXHIBIT "8"

Form 1151-2. 500M—1-27

Missouri Pacific Lines

Delivery Receipt

Delaware, Okla., Station, May 14th, 1927.

Consignee: Dow Rana. Freight bill No.: 69.
Destination: ——.
Route (Point of origin to destination): Mo. P.

Received of Missouri Pacific Railroad Co. the following described property:

Way-billed from Malvern, Ark. Way-bill date and No.: May 4th, 45. Full name of shipper: T. S. Fisher. Car initials and No.: M. P. 52094. Point and date of shipment: ——. Connecting line reference: ——. Previous way-bill [fol. 358] references: ——. Original car initials and No.: M. P., 14825.

Number of packages, articles, and marks	Weight	Rate	Freight	Advances	Total
60 stocker cattle	20,000	29½	59.00	1.00	60.00

Cks 3 dead at destn. when unloaded. OS&D 33 5-14.
Total prepaid: $ ——.
Total to collect: 60.00.

Received in good order for account consignee 5-14-27. 192–.

Signature: Dow Rana.

This is a receipt for delivery of freight and does not indicate the payment of charges. To be filed in pro. no. order.

(Defendant's Exhibit "8," concluded.)

By Mr. Curtis:

Q. I will ask you, Mr. Galatian, if the number of deads, as shown by those receipts, aggregate—I will ask you what the aggregate number of deads was on the five cars, as disclosed by those receipts (indicating).

A. There is ten dead on these receipts (indicating).

Q. I hand you a paper marked Defendant's Exhibit "1" [fol. 359] (handing paper to witness) and ask you if that claim for loss and injuries to the stock in these five cars about which we have been inquiring, and the other two cars that came in on the 8th—if that was made out by you?

A. It was.

Q. Was Mr. Hartley present when that claim was made out?

A. He was.

Q. How did you reach the conclusion there or find the number of cattle which is charged for or billed there in that statement, that is, the number of forty-six head?

A. Well, that was the number that was dead in the cars, and that included the twelve that was dead—in all seven cars at Delaware, and what checked short from the original billing.

Q. Now, did your original billing that you had at that time show where these others had died or had been discharged or released from the shipment?

A. No, sir, it didn't show.

Q. So you got that number—checked the cars as unloaded against the number as shown in the original billing?

A. Yes, sir.

Q. And the aggregate in the seven cars showed a shortage of this forty-six head?

A. Yes, sir.

Mr. Curtis: Take the witness.

[fol. 360] Cross-examination.

By Mr. Moreland:

Q. Did you see these cattle unloaded that night?

A. No, I didn't see the five cars unloaded.

Q. You didn't see the five cars unloaded? Are you sure of that?

A. Well, I am not exactly positive of it, but I am almost sure that I didn't see the five cars unloaded.

Q. Isn't it a fact that Mr. Hartley came up to your house after you about two o'clock that morning and brought you down there and they unloaded them, and then you went on home and you came back down there after daylight the next morning and unlocked the pens and let them out?

A. In one of the shipments he came over to the house about two o'clock——

Q. Yes.

A. —but I don't remember which shipment it was.

Q. Well, if he says it was this shipment, you won't dispute his word, will you?

A. Well, I wouldn't dispute his word if he said—which ever shipment he said it was, because I know he came over there.

Q. Yes.

A. He came over there twice real early in the morning, but if it was the five cars, they were unloaded before I got there because I didn't check none of them out of the car. They were already in the pens when I got there.

[fol. 361] Q. Now, then, what kind of an inspection did you give them in the pen there, or did you give them any inspection?

A. Well, only just by looking at them as we were counting them.

Q. You counted them?

A. Yes, sir.

Q. And you counted the deads?

A. There was three or four of us counted them.

Q. Who?

A. Well, there was Mr. Hartley and I and the helper.

Q. Do you remember the helper's name?

A. Mr. Mitchell; and I believe Dow Rana was there and counted them—I believe—I know there was quite a bunch of us around there.

Q. Now, there was a number of cattle that couldn't get up, wasn't there?

A. Well, there was some of them that had to be helped up, and there was some that was crippled, that were dragged out of the cars, that was considered dead—that was marked on the contract (indicating a paper) as dead—that was from the cars, you know——

Q. Now, which cars was that?

A. That would be misunderstood, because they were shown as dead.

Q. Now, was that in the five cars that got in there last?

A. Well, I couldn't say—I don't know.

[fol. 362] Q. But you did help drag some cattle out of the cars?

A. I didn't help. They were drug out—the section men went and cleaned the cars out and disposed of the dead animals.

Q. Now, did you see them haul these cattle away from there?

A. Not the cattle that was hauled off.

Q. Now, a part of these cattle that were down in the pen there: Mr. Hartley refused to receive them, didn't he?—told you he was going to refuse to receive them, and you asked him to take them out of there and look after them, and then he could make his claim for them? Didn't he tell you he would refuse to receive them, and didn't you make that statement to him?

A. I don't remember making that statement.

Q. If Mr. Hartley testifies you did, you wouldn't deny it, would you—for you don't remember?

A. I don't remember making any statement to that effect. I might have made some statement of getting him to take —to take them out; but I don't remember of telling him to take them out and that we would settle up a claim.

Q. Now, when did Mr. Hartley come in to file a claim with you against the railroad company?

A. Well, the date the claim was made.

Q. Wasn't he in before that?

A. He was in once or twice to see me about it.

[fol. 363] Q. And you told him you would have to send and get the shipper's contracts from the point of origin before you could make out the claim?

A. Yes, sir.

Q. Now, you did make out the claim on the 30th of June?
A. Yes, sir.
Q. The date it shows? And you sent it in?
A. Yes, sir.
Q. You made out the claim for him?
A. Yes, sir.

Mr. Moreland: That is all.

Redirect examination.

By Mr. Curtis:

Q. Mr. Galatian, you say you don't remember making any representations of any kind to Mr. Hartley to get him to take these cattle out—that is, about the claim or the payment of the claim?

A. I believe Mr. Hartley will say that I never promised him that we would pay any claim whatever about the cattle. I never said a word about a payment of the claim.

Q. Your employment with the company—your position with the company—does not give you any authority?

A. I have no authority to say. I can take any claim that [fol. 364] is offered me, but I can't tell them whether it will be paid or not.

Q. All you can do is take it and send it in to the proper authorities?

A. I can take it and send it in to the proper authorities, and let it be handled by the proper authorities.

Mr. Curtis: That is all.
Mr. Moreland: That is all.

(Witness excused.)

Henry Thomas Mitchell, being called as the next witness on behalf of the defendant and being first duly sworn according to law, testified as follows, to-wit:

Direct examination.

By Mr. Curtis:

Q. State your name.
A. Henry Thomas Mitchell.

Q. Where do you live, Mr. Mitchell?
A. Adkins, Arkansas.
Q. Where did you live in May, 1927?
A. Delaware, Oklahoma.
Q. What were you doing at Delaware in May of 1927?
A. Station clerk.
Q. Under whom?
A. Under R. N. Galatian—the agent at Delaware.
[fol. 365] Q. The fellow that was just on the witness-stand?
A. Yes, sir.
Q. How long were you at Delaware—at the station at Delaware?
A. Well, I was up there about four years.
Q. Do you recall the shipment of five cars of cattle that came in there early in the morning on May 14th, 1927——
A. Yes, sir.
Q. —in which Mr. Dow Rana and Mr. Hartley were interested?
A. Yes, sir.
Q. What was the first information you had about the arrival of the cattle after they arrived?
A. Well, after the cattle arrived there, why, we unloaded the cattle and put them in the pens—I locked the gate and we went—I went back home.
Q. What time did you go down to the pen the next morning, or did you go down?
A. Well, I didn't go down the next morning—I did go down, too, the next morning, with the agent. I guess it must have been about ten A. M.
Q. Do you recall what time of day the cattle were taken out of the pens the next day?
A. Well, the next day I think the cattle was taken out early the next morning, but I hadn't came up when they were taken out. You see, I was working nights up there.
Q. What became of the key after you locked the——
[fol. 366] A. Well, the key went back to the station.
Q. You left it in the station when you went off up there that morning?
A. Yes, sir.
Q. Did you have an opportunity to see those cattle at any time except during the time of the unloading?

A. Well, I couldn't see very much—it was dark, you know, and I couldn't see very much of them—how they were—at the time they were unloading.

Q. Well, did you see them after they were unloaded at any time, during daylight?

A. Yes, sir.

Q. Did you help count them?

A. No, sir, they was—I didn't help count them the next morning down there—I was down there about the time or afterwards—after they had gotten them out, why, I went down and noticed some that was still left there.

Q. Now, from what you could see of these cattle in unloading them and what opportunity you had of observing them, what can you say as to their general appearance and condition?

A. Well, the cattle was there, and from their appearance and everything, their condition looked awfully thin to me.

Q. How many deads were there, as nearly as you remember?

A. There was twelve, I believe it was.

[fol. 367] Q. Was there any cripples then, in addition to that, that couldn't get up and couldn't get out?

A. Well, some of them—seemed like they was weak, you know, at the time. They would get up and walk a little piece and then would seem like they were weak or something. They couldn't stand up. They would just fall back down.

Mr. Curtis: Take the witness.

Mr. Moreland: No questions.

Mr. Curtis: That is all, Mr. Mitchell.

(Witness excused.)

Mr. Curtis: The Defendant rests.

The defendant rests.

Mr. Moreland: We have no rebuttal.

DEFENDANT'S MOTION FOR DIRECTED VERDICT

Mr. Curtis: Comes now the defendant, at the close of all the testimony, and moves the Court to direct the jury to

return a verdict in favor of the defendant for the reason and upon the ground that under the testimony, taken as a whole, and under the law, there is no testimony or ground upon which to base or sustain a verdict in favor of the plaintiffs as against the defendant.

[fol. 368] The Court: The motion is denied and overruled.

Mr. Curtis: The defendant excepts.

The Court: Gentlemen of the jury, you will be permitted to recess and separate until tomorrow morning at nine o'clock. It is about five o'clock now, and we could not complete the case this evening. You will be permitted to separate, under the usual admonition of the Court not to discuss the case or any subject connected with it, either among yourselves or with anybody else, and not to form or express an opinion until after you have heard the instructions and the argument of counsel. Be back tomorrow morning at nine o'clock.

(Thereupon Court adjourned for the night and until the following day, to-wit, January 29th, 1929, at nine o'clock A. M., at which time it duly reconvened with all the jury present, all court officials present, and all parties and attorneys in this case present as before; and thereupon T. H. Hartley was re-called to the witness-stand for further questioning, at the request of a juror, as shown by the following:)

A Juror: I want to ask the witness a question—Mr. Hartley.

The Court: All right; call the witness, Mr. Hartley. Is there any objection?

(No objection was made on either side.)

T. H. Hartley, recalled as a witness at the request of a [fol. 369] juror, testified further as follows, to-wit:

Question by a Juror:

Q. What do you think was the cause of those cattle's death?

A. Well, I think it was caused by the rough handling of the train from Van Buren to Delaware.

Thereupon the evidence was closed.

(Be it remembered that at or shortly before the close of the evidence, the Defendant submitted to the Court and filed in this cause its Requested Instructions; some of which requested instructions the Court gave to the jury, and some of which the Court refused to give, marking on each of said requested instructions whether given or refused, and noting the exception of the defendant on those refused to be given. And the said Instructions, as requested and as filed in this cause, are, together with all endorsements and notations thereon, in the words and figures following, to-wit:)

[fol. 370] In District Court of Rogers County

[Title omitted]

Instructions Requested by Defendant—Filed Jan. 29, 1929

I

The court instructs the jury that the plaintiffs, under the law and the testimony, has failed to make out their case against the defendant, and the jury is, therefore, directed to return a verdict for the defendant.

Refused 1-29-29.
[fol. 371] Excepted to by Defendant.
Wayne W. Bayless, District Judge.

II

The court instructs the jury that the burden is upon the plaintiffs to establish their cause of action by a fair preponderance of the testimony, and that if they have failed to discharge this duty in that respect, your verdict should be for the defendant.

Refused 1-29-29.
Excepted to by Defendant.
Wayne W. Bayless, District Judge.

III

The court instructs the jury that the fact that several of the cattle included in the shipment out of which this suit originated died, either in transit or in the stock pens at

North Little Rock, is not sufficient within itself to fix, or render the defendant liable in damages for the value thereof, and does not in any way relieve the plaintiffs from establishing the material allegations of negligence of the defendant, as set out in their petition, by a preponderance of the testimony, as set out in this instruction.

Given.

IV

[fol. 372] The court instructs the jury that it is shown by the testimony, and admitted by both the plaintiffs and the defendant, that a portion of the seven cars of cattle originated on foreign lines from the defendant as initial carriers, and that said cattle were delivered by said initial carriers to this defendant at Little Rock, Arkansas.

In that connection you are instructed that, as a matter of law, the defendant being the connecting or delivering carrier is not liable in this action for any injury or damage to, or the death of any of the cattle in question, resulting from the transportation thereof by said initial carrier, and you are, therefore, instructed that you cannot consider the damages resulting to said cattle prior to their delivery to this defendant, and you should eliminate from your consideration all damages, if any, shown by the testimony which occurred to said cattle or any portion thereof while in the hands of the original carrier, and prior to their actual delivery to this defendant.

Given.

V

You are instructed that all of the cattle constituting the seven cars, out of which this suit originated, moved under Uniform Livestock Contracts, which were on file and approved, at the time of their execution by the shipper and [fol. 373] carrier, by the Interstate Commerce Commission, and that said contracts are admitted in evidence by stipulation of the parties.

Given.

And in this connection I instruct you that said contracts, among other things contains the following clauses, which reads:

"Sec. 1 (a). Except in the case of its negligence proximately contributing thereto, no carrier or party in possession of all or any of the livestock herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, the inherent vice, weakness, or natural propensity of the animal, or the act or default of the shipper or owner, or the agent of either, or by riots, strikes, stoppage of labor or threatened violence."

And

"(b) Unless caused by the negligence of the carrier or its employees, no carrier shall be liable for or on account of any injury or death sustained by said live stock occasioned by any of the following causes: Overloading, crowding one upon another, escaping from cars, pens, or vessels, kicking or goring or otherwise injuring themselves or each other, suffocation, fright, or fire caused by the shipper or the [fol. 374] shipper's agent, heat or cold, changes in weather or delay caused by stress of weather or damage to or obstruction of track or other causes beyond the carrier's control."

And

"(c) Except in the case of its negligence proximately contributing thereto, no carrier shall be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done under quarantine regulations or authorities, nor for detention, loss, or damage of any kind occasioned by quarantine laws or in the enforcement thereof; and the shipper shall hold the carrier harmless for any expense it may incur or damages it may be required to pay by reason thereof."

"Section 4. Paragraph. The shipper at his own risk and expense shall load and unload the live stock into and out of cars."

(c) "Before the live stock is removed from the possession of the carrier or mingled with other live stock the shipper, owner, consignee or agent thereof shall inform in writing the delivering carrier of any visible or manifest injury to the live stock."

And that all of the above provisions of the contract constitutes a valid and binding agreement between the parties to this action, and that if you find from the testimony that the injury and loss of the live stock complained of by the [fol. 375] plaintiffs in this action resulted from any of the causes contained in said contract as hereinabove set out, that then and in that event the defendant would not be liable therefor.

Sec. 2 (c). And you are further instructed that if you find from the testimony that the plaintiffs failed to comply with the contract by informing the defendant, in writing, of any visible or manifest injury to that portion of the live stock which plaintiffs allege died, subsequent to their removal from the possession of the defendant, then and in that event the plaintiffs cannot recover as to any of said live stock thereafter dying, or for any injury thereto.

Given.

VI

You are further instructed that it is stipulated that the live stock in question was moved or shipped from a section or territory which was restricted by quarantine regulations on account of tick infection, and into a territory to which said live stock could not be removed under quarantine regulations of the United States Government without being dipped or disinfected. And that said live stock had to be stopped and unloaded and dipped or disinfected at North Little Rock, Arkansas.

Given.

And in this connection you are instructed that the plaintiffs cannot recover for the death or injury to said cattle [fol. 376] or any portion thereof, if any be shown by the testimony, which was either injured or died as a result of unloading the same for dipping, or as a result of such dipping, or the reloading of said cattle after said dipping, or for any injury to said cattle during the period or time which they were held for the purpose of dipping and disinfection.

Given.

W. L. Curtis, Attorney for Defendant.

[File endorsement omitted.]

[fol. 377] And be it remembered that thereupon the Court read his Instructions to the Jury, the said Instructions being filed in open Court, and being, together with all endorsements thereon, in the words and figures following to-wit:

[fol. 378] IN DISTRICT COURT OF ROGERS COUNTY

[Title omitted]

Instructions to Jury—Filed Jan. 29, 1929

GENTLEMEN OF THE JURY: The plaintiffs in this case have filed their amended petition, in which they allege that they are a co-partnership composed of F. M. Hartley and T. H. Hartley; that the defendant is a corporation and, as such, owns and operates a railroad in and through Rogers County, Oklahoma, and that said corporation has an office and an agent at Claremore, and is within the jurisdiction of the Court;

That on or about May 4, 1927, the plaintiffs, through their agent and servant and employee, Dow Rana, delivered [fol. 379] to the Rock Island Railroad Company 90 head of cattle, and to the A. D. & N. and Missouri-Pacific Railroad Company fifty-two head of cattle, and to the Missouri-Pacific Railroad Company 276 head of cattle to be shipped from the state of Arkansas to these plaintiffs at Blue Jacket, Oklahoma.

That thereafter and within a reasonable time from the date of shipment, but on a date not exactly known to plaintiffs, all of said cattle so shipped as aforesaid came into the possession of the Missouri-Pacific Railroad Company, at Little Rock, Ark., for shipment to Nowata, Oklahoma, to these plaintiffs. That said cattle were delivered to the Missouri-Pacific Railroad Company in good condition, and said defendant company thereupon undertook to and agreed to deliver said cattle to these plaintiffs at Nowata, Oklahoma, or any other point designated by these plaintiffs in the state of Oklahoma.

That thereafter and before said cattle were delivered, plaintiffs instructed said defendant company, to deliver said cattle to plaintiffs at Delaware, Okla. That thereafter and on or about May 14, 1927, defendant railroad company delivered said cattle to plaintiffs at Delaware, Oklahoma, and plaintiffs thereupon paid to said railroad company all

money due to it as freight charges and other damages for the transportation and delivery of said cattle.

That said railroad corporation was negligent and care-
[fol. 380] less in the transportation of said cattle in that the train on which they were transported was jerked and shunted to and fro in such a manner that the cattle were thrown from their feet onto the floors of the cars and were trampled upon by other cattle, and that by reason of such rough handling and carelessness and negligence on the part of said railroad corporation in transporting said cattle, the said cattle were bruised, skinned, maimed, lamed, and their bones broken and at the time the said cattle were delivered to plaintiffs at Delaware, Oklahoma, and unloaded from said cars, 42 head of said cattle were dead and more than 50 head of said cattle were in such physical condition that these plaintiffs were required to haul said cattle from said railroad cars to plaintiffs' ranch and thereafter 50 head of said cattle died as a result of the injuries received while being transported by said defendant company as aforesaid. That the injuries to and death of said cattle were the direct and proximate result of the rough, negligent and careless manner in which said cattle were transported by said defendant company, and not as a result of any act on the part of the plaintiffs.

That said 92 head of cattle were reasonably worth the sum of $2760, and as a result of the death of said cattle, due to the rough, careless and negligent act of said rail-
[fol. 381] road company, as aforesaid, these plaintiffs have been damaged in said sum of $2760. And plaintiffs pray judgment against the defendant for said sum of $2760 with interest thereon from May 14, 1927, until paid, at 6% per cent per annum, and for the costs of said action.

To this amended petition, the defendant has filed an amended answer, in which it denies each and every material allegation in said amended petition contained, and alleges that said livestock mentioned by plaintiff, and each and every car thereof, moved under a special live stock contract, which prior to the date of shipment had been filed with the Interstate Commerce Commission, and that under and by virtue of the provisions of said live stock contract said defendant did not assume any liability because of the inherent weakness and the poor, thin, and weak condition of said cattle, and for injury to same resulting in the over-

crowding of them in the cars, and resulting from the stoppage in transit for dipping, nor for the loss of life or injury of said cattle while upon the lines of the original connecting carrier, and that if said plaintiffs lost the number of cattle as alleged in their petition, that said loss was directly the result of the poor, thin and weak condition of the cattle, and of the over-crowding of same in cars, and from the results of dipping said cattle immediately before shipment and at Little Rock in transit, and from loss occurring on [fol. 382] original connecting carrier's line and prior to delivery of said cattle to this defendant, all of which is especially plead as a bar to plaintiff's right of recovery herein.

Defendant further alleges that said live stock contract above referred to, duplicate originals of which were delivered to and should be in the hands of plaintiffs, provide among other things, "that before live stock is removed from the possession of the carrier or mingled with other live stock, the shipper, owner, consignee or agent shall inform, in writing, the delivering carrier any visible or manifest injury to the live stock"; and that no such written notice was given or served upon the defendant in connection with the several car loads of cattle upon which plaintiffs' alleged cause of action is predicated, and especially as to the fifty head of cattle which it is alleged died after being removed to and placed upon pasture; and the above clause in the shipper's contract and in the tariffs governing the movement of such cattle is also especially plead as a bar to plaintiffs' right of recovery herein. And said defendant prays for judgment in its favor.

To the amended answer of said defendant, the plaintiffs filed a reply, in which plaintiffs deny generally and specifically each and every allegation in said amended answer [fol. 383] contained, except such as may be admitted or qualified in the remainder of said reply. For further reply, plaintiffs state that they deny that they failed to give notice of the injury to said cattle as required under the uniform live stock shipping contract plead by defendant, and in this connection, plaintiffs further allege that in the event the notice which they did give was incomplete or insufficient for any purpose, the defendant waived the lack of notice or its lack of completeness or sufficiency. And said plaintiffs pray for judgment as in their amended petition.

These pleadings give rise to and form the issues of fact to be tried by the jury; and as to the law applicable thereto the Court gives you the following instructions:

No. 1

The court instructs the jury that the fact that several of the cattle included in the shipment out of which this suit originated died, either in transit or in the stock pens at North Little Rock, is not sufficient within itself to fix, or render the defendant liable in damages for the value thereof, and does not in any way relieve the plaintiffs from establishing the material allegations of negligence of the defendant, as set out in their petition, by a preponderance of the testimony, as set out in this instruction.

No. 2

The Court instructs the jury that it is shown by the [fol. 384] testimony, and admitted by both the plaintiffs and the defendant, that a portion of the seven cars of cattle originated on foreign lines from the defendant as initial carriers, and that said cattle were delivered by said initial carriers to this defendant at Little Rock, Ark.

In that connection you are instructed that, as a matter of law, the defendant being the connecting or delivering carrier is not liable in this action for any injury or damage to, or the death of any of the cattle in question, resulting from the transportation thereof by said initial carrier, and you are, therefore, instructed that you cannot consider the damages resulting to said cattle prior to their delivery to this defendant, and you should eliminate from your consideration all damages, if any, shown by the testimony which occurred to said cattle or any portion thereof while in the hands of the original carrier, and prior to their actual delivery to this defendant.

No. 3

You are instructed that all of the cattle constituting the seven cars, out of which this suit originated, moved under Uniform Livestock Contracts, which were on file and approved, at the time of their execution by the shipper and

carrier, by the Interstate Commerce Commission, and that said contracts are admitted in evidence by stipulation of the parties.

[fol. 385] And in this connection you are instructed that said contracts, among other things, contain the following clauses:

"Sec. 1. (a) Except in the case of its negligence proximately contributing thereto, no carrier or party in possession of all or any of the livestock herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, the inherent vice, weakness, or natural propensity of the animal, or the act or default of the shipper or owner, or the agent of either, or by riots, strikes, stoppage of labor or threatened violence."

And

"(b) Unless caused by the negligence of the carrier or its employees, no carrier shall be liable for or on account of any injury or death sustained by said live stock occasioned by any of the following causes: overloading, crowding one upon another, escaping from cars, pens, or vessels, kicking or goring or otherwise injuring themselves or each other, suffocation, fright, or fire caused by the shipper or the shipper's agent, heat or cold, changes in weather or delay by stress of weather or damage to or obstruction of track or other causes beyond the carrier's control."

And

[fol. 386] "(c) Except in the case of its negligence proximately contributing thereto, no carrier shall be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done under quarantine regulations or authorities, nor for detention, loss or damage of any kind occasioned by quarantine laws or in the enforcement thereof; and the shipper shall hold the carrier harmless for any expense it may incur or damages it may be required to pay by reason thereof."

"Section 4. (a) The shipper at his own risk and expense shall load and unload the live stock into and out of the cars."

"(c) Before the live stock is removed from the possession of the carrier or mingled with other live stock the shipper, owner, consignee or agent thereof shall inform in writing the delivering carrier of any visible or manifest injury to the live stock."

And that all of the above provisions of the contract constitute a valid and binding agreement between the parties to this action, and that if you find from the testimony that the injury and loss of the live stock complained of by the plaintiffs in this action resulted from any of the causes contained in said contract as hereinabove set out, that then and in that event the defendant would not be liable therefor.

[fol. 387] No. 4

There is a further provision in said contract as follows:

"Section 2. (c) Claims for loss, damage, or injury to live stock must be made in writing to the originating or delivering carrier or carriers issuing this bill of lading within six months after the delivery of the live stock (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within six months (or nine months in case of export traffic) after a reasonable time for delivery has elapsed; provided, that if such loss, damage or injury was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessless or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

And you are further instructed that if you find from the testimony that the plaintiffs failed to comply with the contract by informing the defendant, in writing, of any visible or manifest injury to that portion of the live stock which plaintiffs allege died, subsequent to their removal from the possession of the defendant, then and in that event the plaintiffs cannot recover as to any of said live stock thereafter dying, or for any injury thereto.

[fol. 388] However, you are further instructed that the notice as provided for in said contract may in certain cases be waived, and, in the event that you should find under the facts and circumstances in this particular case that the

said injuries complained of were visible and manifest and could have been observed by the station agent by the exercise or ordinary ability, then and in that event the said notice would not have to be served upon the said defendant as provided for in said contract.

Given 1-29-29.
Excepted to by Defendant.

Wayne W. Bayless, District Judge.

No. 5

You are further instructed that it is stipulated that the live stock in question was moved or shipped from a section or territory which was restricted by quarantine regulations on account of tick infection, and into a territory to which said live stock could not be removed under quarantine regulations of the United States Government without being dipped or disinfected; and that said live stock had to be stopped and unloaded and dipped or disinfected at North Little Rock, Arkansas.

And in this connection you are instructed that the plaintiffs cannot recover for the death or injury to said cattle [fol. 389] or any portion thereof, if any be shown by the testimony, which was either injured or died as a result of unloading the same for dipping, or as a result of such dipping, or the reloading of said cattle after said dipping, or for any injury to said cattle during the period of time they were held for the purpose of dipping and disinfection.

No. 6

You are further instructed that evidence has been introduced showing that the cattle had been dipped previous to the time of shipment, and in this connection you are instructed that, if you should find and believe from the evidence that the plaintiffs' damages were sustained by reason of the said cattle being dipped prior to the time of shipment or that the cattle were shipped in a weakened condition and that the damages occurred by reason of their weakened condition, then and in that event the plaintiffs would not be entitled to recover. However, if you find that the cattle were in a weakened condition by reason of the dipping, or that the cattle were shipped when they were in a weakened condition, you are instructed that the de-

fendant railroad company would be bound to use ordinary and reasonable care in the transporting of said cattle, and that the defendant would be liable for any and all damages occasioned by the negligence of said defendant or its em- [fol. 390] ployees in the operation of the trains transporting said cattle.

Given and excepted to by defendant.

Wayne W. Bayless, District Judge.

No. 7

You are further instructed that, if you should find that the defendant was negligent in the operation of its trains and that as a result thereof said cattle or any part of them were injured, by reason thereof, then you should return a verdict for the plaintiffs in such sum as you find from the evidence they were damaged, not exceeding, however, the sum of $2760.

Given and excepted to by Defendant.

Wayne W. Bayless, District Judge.

No. 8

You are instructed that in this case the burden of proof is upon the plaintiff to establish by a preponderance of the evidence all the material allegations in the petition alleged.

"By a "Preponderance of the evidence" is not meant [fol. 391] the greater number of witnesses testifying on either side, but it is that evidence which is most convincing and satisfying to your minds.

No. 9

You are instructed that you are the exclusive judges of all the questions of fact in this case, and of the credibility of the witnesses who have testified before you and the weight you will give to the testimony of each of them. You are to determine from the appearance of the witnesses on the stand, their manner of testifying, their candor and fairness, the degree of intelligence they possess, their interest, if any, in the result of your verdict, their means of knowing the facts concerning which they have testified, their temper, feeling, bias or prejudice, if any has been shown, and from all other circumstances appearing at the trial,

which witnesses you will believe and what weight you will give to the testimony of each of them.

No. 10

You are instructed that in arriving at your verdict in this case you will not single out any particular instruction or paragraph of any instruction given you herein, but you will consider the instructions as a whole and in their entirety, and consider each instruction in connection with all the others given in this case, and so apply such instruc-
[fol. 392] tions in their entirety to the evidence before you, and in so doing endeavor to arrive at a just and true verdict under all the instructions and all the evidence in the case, and return such verdict into Court.

No. 11

You are instructed that nine or more of your number may return a verdict in this case, but in case a verdict is returned by any number less than the whole panel, then each juror concurring in such verdict should sign the same. In the event your verdict is unanimous, then the same shall be signed by your foreman only.

Wayne W. Bayless, District Judge.

[File endorsement omitted.]

[fol. 393] (After the reading of the foregoing Instructions to the jury and the subsequent returning and receiving of the Verdict, the following proceedings were had in relation to the wording of said verdict:)

Mr. Curtis: Your Honor, the last part of the verdict, that part as to the interest, is just surplusage in the verdict.

Mr. Moreland: Yes, that is correct. We agree that it may be stricken.

Mr. Curtis: Let the record show that it is agreed between counsel for the plaintiffs and counsel for the defendant that the six per cent interest in the verdict is surplusage and may not be considered. Is that correct?

Mr. Moreland: Yes.

The Court: All right; it is so agreed. And the jury is discharged from further consideration of this case.

(And the said Verdict rendered and returned by the jury herein, and received, read, and filed in open court, is, together with all endorsements thereon, in the words and figures following, to-wit:)

[fol. 394] IN DISTRICT COURT OF ROGERS COUNTY

[Title omitted]

VERDICT—Filed Jan. 29, 1929

We, the jury, duly empaneled and sworn to try the above entitled cause, upon our oaths find the issues in favor of the plaintiff and against the defendant, and assess the amount of plaintiff's recovery in the sum of $1750.00 with 6 per cent interest.

J. A. Cockrum, Foreman.

[fol. 395] [File endorsement omitted.]

[fol. 396] IN DISTRICT COURT OF ROGERS COUNTY

[Title omitted]

MOTION FOR NEW TRIAL—Filed Jan. 31, 1929

Comes now the defendant, Missouri Pacific Railroad Company, by its Attorney, W. L. Curtis, and files this its motion for a new trial herein, and for cause, states.

1

That the verdict of the jury is contrary to law.

[fol. 397]

2

That the verdict of the jury is contrary to the evidence.

3

That the verdict of the jury is contrary to, and is not supported by either the law or the evidence.

4

For errors occurring during the progress of the trial, which were excepted to at the time.

5

The court erred in overruling the defendant's demurrer to plaintiff's evidence at the time the plaintiff rested their case.

6

The court erred in overruling the defendant's motion for a directed verdict at the close of the evidence for both the plaintiff and defendant in the case.

7

The court erred in overruling and denying the defendant's requested instruction Number 1, to which refusal the defendant excepted at the time.

8

The court erred in refusing to give instruction Number 4 in the form and language in which said instruction was requested, and especially erred in giving upon his own motion or at the request of counsel for the plaintiff, the modi-
[fol. 398] fication of the last paragraph thereof, to all of which the defendant excepted and caused its exceptions to be noted at the time.

9

The court erred in giving, either upon its own motion or upon request of counsel for plaintiffs, instructions Numbers 6 and 7, to the giving of which the defendant at the time excepted and caused its exceptions to be noted of record.

Wherefore, premises considered, the defendant, Missouri Pacific Railroad Company prays for an order and judgment of this court sustaining this motion and setting aside the verdict of the jury and granting it a new trial herein, and for all other proper relief.

Missouri Pacific Railroad Company, by W. L. Curtis,
Its Attorney.

[fol. 399] [File endorsement omitted.]

[fol. 400] IN DISTRICT COURT OF ROGERS COUNTY

[Title omitted]

MINUTE ENTRY—March 30, 1929

Hearing on motion continued until 4/1/1929, at 10 A. M.

* * * * * * *

Court recesses subject to call.

Wayne W. Bayless, District Judge.

[fol. 401] IN DISTRICT COURT OF ROGERS COUNTY

[Title omitted]

ORDER OVERRULING MOTION FOR NEW TRIAL, ETC.—April 1, 1929

[fol. 402] This cause comes on for hearing on motion for new trial, which motion is by the court overruled, to which defendant excepts, and in open court gives notice of appeal. For good cause shown, defendant is given 60 days within which to make and serve a case-made, the plaintiffs are given 10 days thereafter within which to suggest amendments to case-made, same to be settled on five days notice by either party. Defendant given 30 days to make and file supersedeas bond, as per Journal Entry. * * *

Court reeesses subject to call.

Wayne W. Bayless, District Judge.

[fol. 403] IN DISTRICT COURT OF ROGERS COUNTY

[Title omitted]

JOURNAL ENTRY OF JUDGMENT—Filed April 6, 1929

Now on this the 28th day of January, 1929 this cause came on to be heard, when present the plaintiffs in person and by attorneys, Robson & Moreland, and the defendant being

present by its attorney, W. L. Curtis, both parties announced ready for trial;

Whereupon a jury was called, impaneled and sworn to [fol. 404] try the issues joined in the case, and after hearing the evidence, instructions of the court, and the argument of counsel, retired to consider of their verdict, and thereafter and on the 29th day of Jany, 1929, returned into court the following verdict, to-wit:

STATE OF OKLAHOMA,
County of Rogers, ss.:

IN THE DISTRICT COURT

No. 7709

HARTLEY BROTHERS, Plaintiffs,

vs.

MISSOURI PACIFIC RY. CO., Defendant

VERDICT.

We, the jury, duly empaneled and sworn to try the above entitled cause, upon our oaths find the issues in favor of the plaintiff and against the defendant, and assess the amount of plaintiff's recovery in the sum of $1,750.00 with 6 per cent interest.

J. A. Cockrum, Foreman.

Thereafter and within the time provided by law, the defendant filed its motion for a new trial, and thereafter and on the 1st day of April, 1929, when present the plaintiffs [fol. 405] by their attorneys, and the defendant by its attorney, said motion came on for hearing, and the court, after hearing same, overruled said motion, to which ruling of the court the defendant then and there excepted and caused its exceptions to be noted of record.

Thereupon the plaintiffs moved for judgment upon the verdict, which motion was by the court sustained, and it was therefore considered, ordered and adjudged by the court that the plaintiffs have and recover of and from the defendant the sum of $1,750.00 as and for their damages, together with all of their costs in and about this suit laid

out and expended, to which judgment of the court, the defendant excepted and caused its exceptions to be noted of record.

The defendant thereupon, in open court, gave notice of its intention *of* appeal this case to the Supreme Court of the State of Oklahoma, and caused said notice to be entered upon the minutes of the court and the records thereof, and upon application and for good cause shown, the defendant was given sixty days in which to prepare and serve case-made, the plaintiffs were given ten days thereafter in which to suggest amendments, the case to be settled upon five days notice, by either party. On request of the defendant, it was given thirty days in which to file supersedeas bond, and execution was stayed pending the filing of same.

Wayne W. Bayless, Judge.

[fol. 406] [File endorsement omitted.]

[fols. 407-418] Supersedeas bond on appeal for $3,600, approved and filed April 6, 1929, omitted in printing.

[fol. 419] Minute entry of argument and submission, November 29, 1932, omitted in printing.

[fol. 420] IN SUPREME COURT OF OKLAHOMA

No. 20751

MISSOURI PACIFIC RAILROAD COMPANY, a Corporation, Plaintiff in Error,

vs.

HARTLEY BROTHERS, a Copartnership Composed of F. M. Hartley and T. H. Hartley, Defendants in Error

JUDGMENT—Dec. 20, 1932

And now this cause comes on for final decision and determination by the court upon the record and briefs filed therein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby affirmed.

Opinion by Riley, J.

[fol. 421] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 20751

MISSOURI PACIFIC RAILROAD COMPANY, a Corporation, Plaintiff in Error,

v.

HARTLEY BROTHERS, a Copartnership Composed of F. M. Hartley and T. H. Hartley, Defendants in Error

Syllabus

1. In an action at law where a question presented involving the sufficiency of the evidence to support the verdict and judgment, this court will not resolve any mere conflict in the testimony in favor of an aggrieved party, but where there is evidence in the record which reasonably tends to support the verdict, this court will sustain a judgment based thereon.

2. Under a uniform shipper's contract based upon Act of Congress March 4, 1915, 38 Stat. at Large 1196, amendatory of former Acts, a plaintiff is not required to file a claim within time specified in the contract where the loss or damage for which recovery is sought occurred while a shipment of cattle was in transit as a result of the carelessness or negligence of the carrier.

Error from the District Court of Rogers County, State of Oklahoma

Honorable Wayne W. Bayless, Judge

Affirmed

Thomas B. Pryor, W. L. Curtis, Ft. Smith, Ark., for plaintiff in error.

Robson & Moreland for defendants in error.

[fol. 422] OPINION—Filed Dec. 20, 1932

RILEY, J.:

Judgment below was in the sum of $1,750.00, and interest, based on loss of 92 head of cattle occasioned by the carelessness and negligence of the appellant carrier in handling said cattle while in transit from Little Rock, Arkansas, to Delaware, Oklahoma.

The defendant denied generally and relied upon a defense that not its carelessness and negligence in handling in transit of the cattle caused the damage, but that it was caused by the poor and weakened condition of the cattle and by the dipping of them prior to transportation. The jury determined this issue in favor of plaintiff and there is evidence to support the verdict. Cardwell-Lyman Sales Co., v. Liebman, et al, 110 Okla. 21, 236 P. 16; St. L. & S. F. Ry Co. v. Rondell, 108 Okla. 132, 235 P. 491.

Error is predicated upon the instructions given and refused by the trial court. This alleged error is a contention regarding the requirement of notice in writing of claim for loss and damage sustained in shipment under the uniform livestock contract pursuant to federal acts relating to interstate commerce.

The court below instructed that the requirement of such notice by the contract might be waived when the injury was manifest. See: St. L. & S. F. Ry. Co. v. Ladd, 33 Okla. 160, 124 P. 461; Harn v. Smith, 85 Okla. 137, 204 P. 542; Kerr v. Aetna, 124 Okla. 112, 254 P. 105.

It is our view that a decision as to waiving of notice in the contract presented is not necessary to the determination of this cause for the recovery herein sought was for damage in transit occasioned by the negligence and carelessness of the defendant carrier.

The Act of Congress, March 4, 1915, 38 Stat. at L. 1196, amendatory of former Acts in our opinion eliminates the necessity of notice in certain events as a condition precedent to recovery.

[fol. 422½] The proviso of that Act reads:

"Provided, that if such loss, damage or injury was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice

of claim nor filing of claim shall be required as a condition precedent to recovery."

In Barrett v. Van Pelt, 268 U. S. 85, 69 L. Ed. 857, this proviso was construed to mean:

"that carelessness or negligence is an element in each case of loss, damage or injury included therein, and that in such cases, carriers are not permitted to require notice of claim or filing of claim as a condition precedent to recovery."

Davis v. Roper Lbr. Co., 269 U. S. 158, 70 L. Ed. 209;
Haley v. Oreg. Short Line R. Co., 253 Fed. 569;
Radovsky v. N. Y., N. H. & H. R. Co., (Mass.) 154 N. E. 334.
Hunt v. Hines, Director Gen. ((Mo.), 223 S. W. 798;
Wichita Ry. Co. v. Davis (Tex.) 275 S. W. 619;
Reedy v. Mo. P. R. Co., (Kan.) 255 P. 683.

Finding no reversible error in the trial court's instructions the judgment is affirmed.

Clark, V. C. J.; Hefner, Cullison, Swindall, Andrews, McNeill, JJ., concur.
Kornegay, J., Not participating.
Lester, C. J., Absent.

[fol. 423] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PETITION FOR REHEARING—Filed Jan. 4, 1933

Comes now the plaintiff in error and presents to the Court its petition for rehearing by this Court on the opinion filed in this case on December 20, 1932, and for cause states:

1. The Court erred in finding as a matter of fact, and holding as a matter of law, that based upon the evidence in this case, as disclosed by the record, that it was not necessary for the defendants in error to comply with the provisions of the uniform live stock contract forming the

basis of this action, by giving to the plaintiff in error notice of injury to the cattle in question before removing the same from the plaintiff in error's premises, or permitting them to comingle with other cattle.

2. The Court erred in disregarding, as a matter of fact, and failing to give effect to the undisputed testimony that the cattle which died after delivery to the defendants in error and removed from the plaintiff in error's premises were receipted for by the defendants in error at the time of said delivery, as being in good condition and without exception.

3. The Court erred in holding, as a matter of law, that the undisputed fact that the original claim was filed by the defendants in error covering the cattle injured and dead [fol. 424] prior to the delivery when taken in connection with their failure to file an amended or supplemental claim within nine months thereafter for the remaining 50 head of cattle forming the basis of this action was without any probative force in estopping the defendants in error from enlarging said claim by suit to cover the additional 50 head which was receipted for in good condition and removed from plaintiff in error's premises, and alleged in the suit to have died thereafter.

4. The Court erred in holding, as a matter of law, that the trial court did not err in instructing the jury that the provision of the uniform live stock contract under which the shipments in question were transported, and which was a part of the tariffs in force and on file with the Interstate Commerce Commission, could be waived.

5. The Court erred in finding and holding, as a matter of law, that the provisions of the uniform live stock contract above referred to, which provides that under certain conditions the claim for loss or damage must be filed within nine months after date of delivery was not effective as a defense to that portion of the shipment which was receipted for by the defendants in error in good condition and removed from plaintiff in error's premises, and which was included in the suit after the expiration of nine months, and which was not covered by the original claim.

Wherefore, premises considered, plaintiff in error prays for an order of the Court granting it a rehearing herein,

and that upon said rehearing the opinion heretofore filed in this case be recalled and the original judgment of the trial court reversed and the case remanded as prayed for in its original petition in error, and for all other proper relief.

Missouri Pacific Railroad Company, by W. L. Curtis,
Its Attorney.

[fol. 425] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER DENYING REHEARING—Feb. 28, 1933

And now on this day it is ordered by the court that the petition for rehearing filed in the above cause, be, and the same is hereby denied.

[fol. 426] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PETITION FOR A STAY OF JUDGMENT PENDING APPLICATION FOR WRIT OF CERTIORARI—Filed March 8, 1933

Comes the Plaintiff in Error, Missouri Pacific Railroad Company, and petitions the Court to grant it a stay of judgment and execution pending application for writ of certiorari to the United States Supreme Court, and for grounds therefor states:

I

That the record will have to be copied by the Clerk of this Court and printed by the Clerk of the United States Supreme Court before petition for certiorari may be presented.

Wherefore petitioner prays that the judgment and execution be stayed for a period of three months to enable petitioner to present application in the United States Su-

preme Court for a writ of certiorari, upon the giving of bond provided for in the Act of Congress approved February 13, 1925, which provides as follows:

"In any case in which the final judgment and decree of any Court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time, to enable the party aggrieved to apply for and obtain a writ of certiorari granted by the Judge of the Court rendering the judgment, or by a Justice of the Supreme Court, and may be conditioned upon the giving of good and sufficient security, to be approved by such Judge or Justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his appeal good in the Supreme Court, he shall answer all damages or costs which the other party may sustain by reason of the stay."

[fol. 427] That a reasonable time be given in which to file bond, as provided by said Act.

Respectfully submitted.

Thomas B. Pryor, Attorney for Petitioner.

[fol. 428] 3/8/33.—Leave granted to file.

Fletcher Riley, Chief Justice.

[File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

SUPPLEMENTAL PETITION TO STAY MANDATE ON JUDGMENT PENDING APPLICATION FOR WRIT OF CERTIORARI—Filed March 8, 1933

Comes now the plaintiff in error, Missouri-Pacific Railroad Company, and files its petition supplemental to its petition for a stay of judgment pending application for writ of certiorari, and for cause states:

First. That the opinion was filed in this case by this court on December 20, 1932, and that thereafter and within the time provided by law plaintiff in error filed its petition for rehearing, and that thereafter and on the 28th day of February, 1933, this court entered its order overruling and denying said petition.

Second. That thereafter and on the 8th day of March, 1933, plaintiff in error filed its petition for a stay of judgment pending application for a writ of certiorari to the Supreme Court of the United States and in connection therewith tenders its supersedeas bond in the sum of $3,000.00, executed by the plaintiff in error with the United States Fidelity & Guaranty Company of Baltimore, Maryland, as surety thereon.

Third. That said petition to stay judgment pending application for writ of certiorari was presented to the Chief [fol. 429] Justice of this court on March 8, 1933, and it was thereupon ascertained that the mandate had been issued by the Clerk of this court and *and* transmitted to the Clerk of the trial court at Claremore, Rogers County, Oklahoma, on the 7th day of March, 1933.

Fourth. Your petitioner states that it is informed and believes and upon such information and belief states that the mandate has not as yet been spread of record and that no execution has been issued by the Clerk of the District Court of Rogers County on the judgment, and that there will not be a presiding judge on the bench in the District Court at Claremore until the third Monday or 20th of March, 1933, and hence the mandate cannot be spread of record prior to that date.

Fifth. That the petition for stay of execution pending application for writ of certiorari was made in good faith and for the purpose of having the Supreme Court of the United States, if possible, take jurisdiction of this case and review the same in connection with the Federal questions involved and especially the question raised in connection with the construction of the uniform livestock contract which entered into the trial of said case in the District Court.

Wherefore, premises considered, your petitioner prays for an order of this court directed to the District Court of

Rogers County, Oklahoma, requiring that all further procedure be stayed on the mandate heretofore issued in this case pending the determination of a review of the same on certiorari, and for an order on its original petition for stay of mandate herein, granting same and approving its stay bond and giving it 90 days in which to enable it to secure a transcript of the record and apply to the Supreme Court of the United States for a writ of certiorari, and for all proper relief.

Missouri-Pacific Railroad Company, by Thomas B. Pryor, Attorney.

[fol. 430] To Robson & Moreland, attorneys of record for Hartley Brothers, the above-named defendants in error:

You are hereby notified that the above application and the application to which it refers will be presented to the Supreme Court of the State of Oklahoma on Monday, March 20th, 1933.

Thomas B. Pryor, Attorney for Plaintiff in Error.

We, the undersigned attorneys of record for Hartley Brothers, defendants in error, hereby accept service of copy of the above foregoing petition, together with the said notice upon us, on this the 8th day of March, 1933.

Robson & Moreland, Attorneys for Defendants in Error.

[fol. 431] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER SUSTAINING MOTION TO STAY MANDATE—March 14, 1933

And now on this day it is ordered by the court that the motion of plaintiff in error in the above cause to stay mandate on judgment pending application for writ of certiorari, be, and the same is hereby sustained.

[fol. 432] [File endorsement omitted.]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER STAYING JUDGMENT—Filed March 28, 1933

Now on this the 27th day of March, 1933, is presented to Fletcher Riley, Chief Justice of the Supreme Court of Oklahoma, the petition of the above named Plaintiff in Error for a stay of judgment pending application for a writ of certiorari from the Supreme Court of the United States in the above styled and numbered cause, and the Justice, after hearing said petition and being well and sufficiently advised in the premises, doth find that said petition should be granted, upon the plaintiff in error entering into a good and sufficient bond in the sum of $3,000.00, for the payment of said judgment in case said writ of certiorari should be denied or the application therefor being waived within ninety days from this date.

It is, therefore, considered, ordered and adjudged by the Court that the petition of the Missouri Pacific Railroad Company, a corporation, plaintiff in error above named, for a stay of judgment pending application to the Supreme Court of the United States for a writ of certiorari in this case, be, and the same is hereby allowed, and that the judgment herein is hereby stayed for a period of Ninety days from and after this date upon which the said petitioner filing a good and sufficient bond, as herein provided by law, with 5 days from this date.

Fletcher Riley, Chief Justice.

[fols. 433 & 434] Supersedeas bond on petition for certiorari for $3,000, approved and filed March 8, 1933, omitted in printing.

[fol. 435] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 436] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING RECORD

Comes now Thos. B. Pryor, Attorney of record for the above named petitioner, and G. C. Spillers, Attorney of record for the above named respondents, and stipulate as follows:

That the following pages of the transcript from the Clerk of the Supreme Court of Oklahoma is sufficient to present the questions involved and desired to be presented to the Supreme Court of the United States, to-wit:

1. The amended petition, transcript, pages 28 to 31 inclusive.

2. Answer of petitioners, transcript, pages 33 to 35 inclusive.

3. Amended reply of respondents, transcript, pages 44 to 45 inclusive.

4. Testimony, pages 67 to 182 inclusive. All.

5. Testimony, pages 197 to 221 inclusive. All.

6. Testimony, transcript, pages 282 to 310 inclusive. All.

7. Testimony and proceedings, transcript, pages 330 to 369 inclusive.

[fols. 437 & 437½] 8. Proceedings, transcript, pages 370 to 408 inclusive.

9. Proceedings, transcript, pages 419 to 434 inclusive.

10. Petition in Error to State Supreme Curt, transcript, pages 1 to 3 inclusive.

And that the Clerk of the United States Supreme Court may reduce the printed record for use in said Court so as to eliminate all other portions of the record, except that portion of same as hereinabove designated, it being also understood and agreed that only one out of the seven copies of the "Uniform Live Stock Contracts" involved in this action is necessary for the printed record.

Dated this the 8 day of May, 1933.

Thomas B. Pryor, Attorney for Petitioner. G. C. Spillers, 601 Beacon Life Bldg., Tulsa, Okla., Attorney for Respondents.

[fol. 438] IN SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME

Upon due cause shown, it is ordered that the time within which a petition for a writ of certiorari to review the judgment of the Supreme Court of Oklahoma, in this cause may be presented to the Supreme Court of the United States, is hereby extended for a period of thirty days from this date.

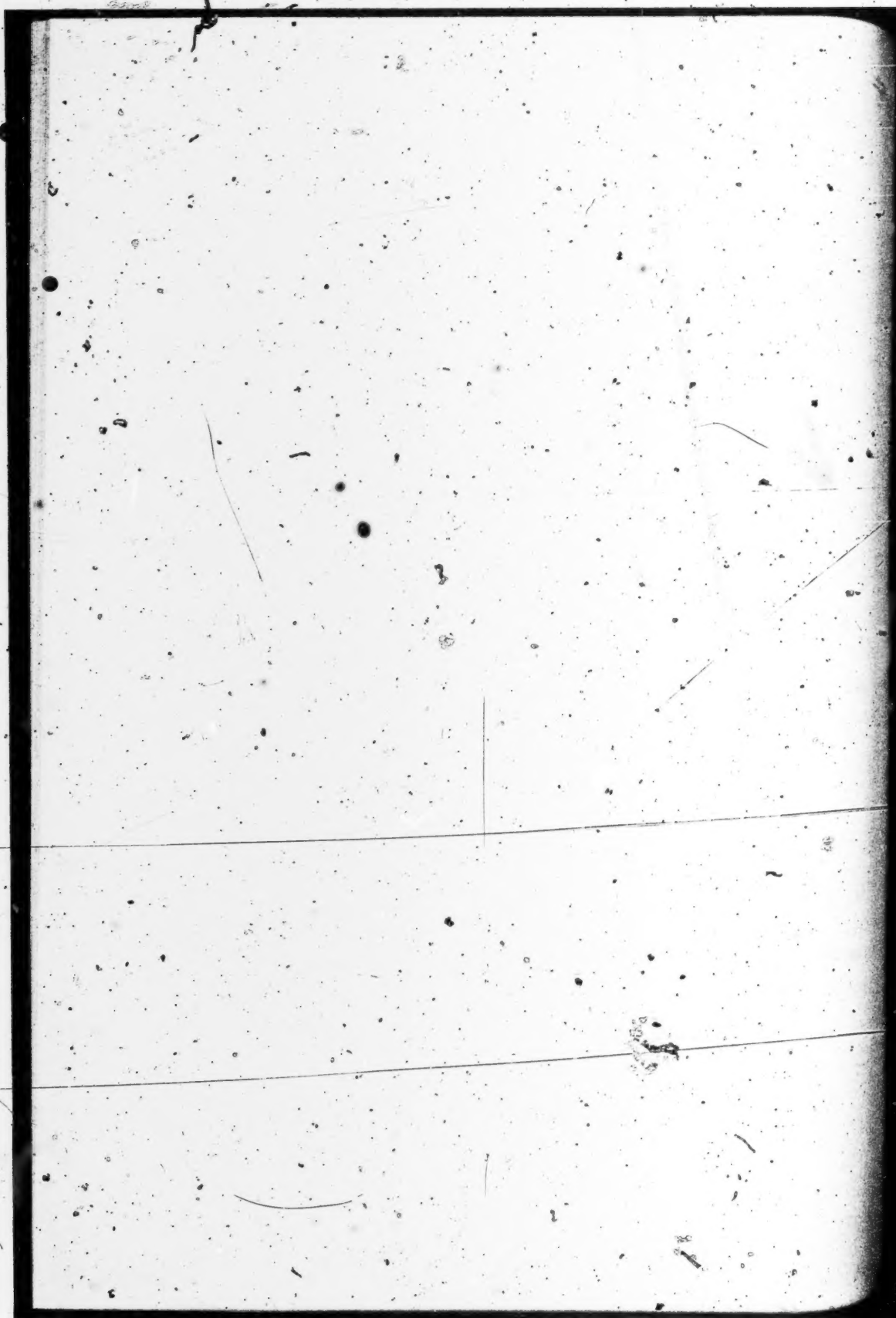
Dated at Washington, D. C., May 26th, 1933.

Willis Van Devanter, Associate Justice.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1933

The petition herein for a writ of certiorari to the Supreme Court of the State of Oklahoma is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



INDEX

	Page
Statement of the Matter Involved	1
Errors Relied on for Allowance of Writ	10
Reasons Relied on for Allowance of the Writ	13
Prayer	14
Brief in Support of Petition for Certiorari	16
Opinion of the Court Below	16
Jurisdiction	16
Specifications of Assigned Errors	19
Argument	21

TABLE OF CASES

Abell v. A.T. & S.F. R. Co. (Kansas), 164 Pac. 269	26
B. & O. S.W. R. Co. v. Settle, 67 L. ed. U.S., 189	32
Beaumont S.L. & W. Ry. Co. v. Magnolia Provisions Co., et al., 26 Fed. (2nd Ed.), 72	32
Davis v. Roper Lumber Co., 70 U.S. L. ed., 209	25
Dean v. Southern R. Co. (S.C.), 91 S.E. 1042	29
Davis v. Portland Seed Co., 68 L. ed. U.S., 762	33
Douglas Shoe Co. v. Pere Marquette Co. (Mich)., 217 N.W., 12	33
Georgia F. & A. R. Co. v. Blish Mill Co., 60 L. ed. U.S., 948	29
Manby v. Union Pacific R. Co., 10 Fed. (2nd Ed.), 327	24
Mo. P. R. v. Porter, 171 U.S. L. ed., 672	26
M. K. & T. R. Co. v. Ward, 61 L. ed. U.S., 1213	31
Pillsbury Flour Mills Co. v. Great Northern R. Co., 25 Fed. (2nd Ed.), 66	31
Reedy v. Mo. P. R. Co. (Kansas), 255 Pac. 683	23
Southern R. Co. v. Prescott, 60 L. ed. U.S., 836	27
Section 501, 13 C.J., page 538	32

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

MISSOURI PACIFIC RAILROAD COMPANY, a Corporation .....Petitioner

vs.

HARTLEY BROTHERS, a Co-partnership composed of F. M. Hartley and T. H. Hartley .....Respondents

---

Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma.

To the Honorable the Supreme Court of the United States:

Your petitioner respectfully shows:

STATEMENT OF MATTER INVOLVED.

The Supreme Court of the State of Oklahoma, being the highest court of the State in which a judgment could be had, has affirmed the judg-

ment of the District Court of the County of Rogers, in the State of Oklahoma, in favor of the respondents and against the petitioner.

The action was brought by the respondents (plaintiff) against the petitioner (defendant) to recover damages on account of injury to certain cattle involved in the shipment of seven car loads from certain counties in the State of Arkansas to Delaware, in the State of Oklahoma, said cattle being from what is commonly designated as quarrantined territory into unquarrantined territory with a provision for the unloading of said cattle at the stock pens at Little Rock, Arkansas for dipping. All of the different seven cars moved under the provisions of what is known as the uniform live stock contract, and involved ninety-four head of cattle out of five of the seven cars, forty-four head of which were alleged to have died either prior to the unloading of same at Little Rock for dipping, during the period of dipping, or between Little Rock, Arkansas, and Delaware, Oklahoma. Fifty head of said cattle were alleged to have died after the cattle was removed from the cars and the stock pens of the defendant to pasturage some seven miles away. Respondents further allege that the negligent handling of these cattle resulted in this loss.

Petitioner filed its answer to the petition of respondents, paragraphs two and three of which reads:

"That if the shipment of live stock moved over the railroad of the defendant, as alleged in said petition, that said live stock or cattle, and each and every car thereof, moved under a special live stock contract, which prior to the date of shipment had been filed with the Interstate Commerce Commission, and that under and by virtue of the provisions of said live stock contract, that said defendant did not assume any liability because of the inherent weakness and the poor, thin and weak condition of said cattle, and for injury to same resulting in the over-crowding of them in the cars, and resulting from the stoppage in transit for dipping, nor for the loss of life or injury of said cattle while upon the lines of the original connecting carrier, and that if said plaintiffs lost the number of said cattle as alleged in their petition, that said loss was directly the result of the poor, thin and weak condition of the cattle, and of the over-crowding of same in cars, and from the results of dipping said cattle immediately before shipment at Little Rock in transit, and from loss occurring on original connecting carrier's line

and prior to the delivery of said cattle to this defendant, all of which is especailly plead as a bar to plaintiffs' right of recovery herein.

"The live stock contract hereinabove referred to, the duplicate originals of which were delivered to and should be in the possession of plaintiffs, provide among other things, 'that before live stock is removed from the possession of the carrier or mingled with other live stock, the shipper, owner, consignee or agent thereof shall inform, in writing, the delivering carrier of any visible or manifest injury to the live stock'; and that no such written notice was given or served upon the defendant in connection with the several car loads of cattle upon which the plaintiff's alleged cause of action is predicated, and especially as to the fifty head of cattle which it is alleged died after being removed to and placed upon pasture. And the above clause in the shipper's contract and in the tariffs governing the movement of such cattle is also especially plead as a bar to plaintiffs' right of recovery herein."

To the answer of the petitioner the respondents filed a general denial, and also a special denial which reads:

"They deny that they failed to give notice to the defendant herein of the injury to said cattle under and by virtue of the provisions of said live stock contract referred to in the answer, and in this connection further state that in the event they did fail to give such notice, that the defendant corporation knew of the injured condition of said cattle and had an agent present at the time said cattle were unloaded at Delaware, Oklahoma, and has had full and complete knowledge of said injured condition of said cattle as these plaintiffs, and that no necessity existed for the giving of said notice. These plaintiffs state further that if they failed to give such notice, the failure to do so has been waived by the defendant by accepting a written claim thereafter on the part of these plaintiffs and considering the same and disallowing the same upon the grounds other than the failure to give such notice as the defendant pleads is necessary to be given."

During the progress of the trial of the case the uniform live stock contract pertaining to each of the cars of cattle involved were offered and admitted in evidence without objection, and with reference thereto attorneys for both the petitioner

and respondents stipulated over their signatures as follows:

> "It is hereby stipulated by and between the attorneys for both plaintiffs and defendant that the uniform live stock contracts offered and admitted in evidence as to each of the cars of cattle in question, were at the time of the execution of same published and on file with the Interstate Commerce Commission and that the same may be used in this case without being formally certified by the Secretary of the Interstate Commerce Commission."

Each of said contracts contain provisions which read:

> "Section 2. (c) Claims for loss, damage or injury to live stock must be made in writing to the originating or delivering carrier or carriers issuing this bill of lading within six months after the delivery of the live stock (or, in case of export traffic within nine months after delivery at port of export) or, in case of failure to make delivery, then within six months (or nine months in case of export traffic) after a reasonable time for delivery had elapsed; provided, that if such

loss, damage or injury was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

"Section 4. (c) Before the live stock is removed from the possession of the carrier or mingled with other live stock, the shipper, owner, consignee or agent thereof shall inform, in writing, the delivering carrier of any visible or manifest injury to the live stock."

The respondent, T. H. Hartley, among other things, testified that following the delivery of the cattle contained in the shipments referred to, he filed a claim with the petitioner, the claim was for 46 head of cattle at $24.00 per head including freight, or $1104.00, this being the number of cattle which respondents claimed was short against the checking of said shipments at the point of origin and at the point of delivery.

The agent of the petitioner at the point of delivery identified receipts executed by the consignee, as shown by the live stock contracts, whom it appears from the testimony during the progress

of the trial, was agent for the respondents, in which all of the cattle involved in the different shipments, except those for which the claim referred to above was filed, was receipted for, which receipt, among other things, provides:

"Received in good order for account of consignee" and specifying the number of cattle actually received. But included in their suit for damages was fifty additional head of cattle, which they allege died after they were carried out to respondents' pasture.

No written notice of any kind was ever served on petitioner, and no claim was ever made prior to the commencement of this action, which was more than eleven months after the delivery of the cattle, for the fifty head which had been receipted for in good order upon their delivery at destination.

The trial court, over the objections of petitioner, in connection with the provisions of the live stock contract, instructed the jury, among other things, as follows:

> "And you are further instructed that if you find from the testimony that the plaintiffs failed to comply with the contract by informing the defendant, in writing, of any

visible or manifest injury to that portion of the live stock which the plaintiffs allege died subsequent to their removal from the possession of the defendant, then and in that event the plaintiffs cannot recover as to any of said live stock thereafter dying, or for any injury thereto.

"However, you are further instructed that the notice as provided for in said contract **may in certain cases be waived**, and, in the event that you should find under the facts and circumstances in this particular case that the said injuries complained of were visible and manifest and could have been observed by the station agent by the exercise of ordinary ability, then and in that event the said notice would not have to be served upon the said defendant as provided for in said contract."

The jury returned a verdict in favor of respondents for $1750.00. Motion for new trial was filed, in which the court's attention was particularly called to the instruction quoted above. The motion for new trial was overruled, and petitioner appealed the case to the Supreme Court of the State of Oklahoma, which said Court, on the 20th day of December, 1932, filed its opinion, not yet

reported, in which the judgment of the trial court was affirmed, paragraph two of the syllabus of the opinion, reads:

> "Under a uniform shipper's contract based upon the Act of Congress March 4, 1915, 38 Stat. at Large 1196, amendatory of former Acts, a plaintiff is not required to file a claim within the time specified in the contract where the loss or damage for which recovery is sought occurred while a shipment of cattle was in transit as a result of the carelessness or negligence of the carrier."

And in the body of the opinion, the Court says:

> "It is our view that a decision as to waiving of notice in the contract presented is not necessary to the determination of this cause for the recovery herein sought was for damage in transit occasioned by the negligence and carelessness of the defendant carrier."

II.

Following the filing of the Supreme Court's opinion, and within the time provided by the rules of the court, the petitioner filed its petition for

rehearing, in which the errors of the Supreme Court of the State of Oklahoma were given in the following assignments:

"1. The court erred in finding as a matter of fact, and in holding as a matter of law, that based upon the evidence in this case, as disclosed by the record, that it was not necessary for the defendants in error to comply with the provisions of the uniform live stock contract forming the basis of this action, by giving to the plaintiff in error notice of injury to the cattle in question before removing the same from the plaintiff in error's premises, or permitting them to co-mingle with the other cattle.

"2. The court erred in disregarding, as a matter of fact, and failing to give effect to the undisputed testimony that the cattle which died after delivery to the defendant in error and removed from the plaintiff in error's premises were receipted for by the defendants in error at the time of said delivery, as being in good condition and without exception.

"3. The court erred in holding, as a matter of law, that the undisputed fact that the original claim was filed by the defendants

in error covering the cattle injured and dead prior to the delivery when taken in connection with their failure to file an amended or supplemental claim within nine months thereafter for the remaining 50 head of cattle forming the basis of this action was without any probative force in estopping the defendants in error from enlarging said claim by suit to cover the additional 50 head which was receipted for in good condition and removed from plaintiff in error's premises, and alleged in the suit to have died thereafter.

"4. The court erred in holding, as a matter of law, that the trial court did not err in instructing the jury that the provisions of the uniform live stock contract under which the shipment in question were transported, and which was a part of the tariffs in force and on file with the Interstate Commerce Commission, could be waived.

"5. The court erred in finding and holding, as a matter of law, that the provisions of the uniform live stock contract above referred to, which provides that under certain conditions the claim for loss or damage must be filed within nine months after date of delivery was not effective as a defense to

that portion of the shipment which was receipted for by the defendants in error in good condition and removed from plaintiff in error's premises, and which was included after the expiration of nine months, and which was not covered by the original claim."

Thereafter and on February 28th, 1933 the Supreme Court of the State of Oklahoma overruled and denied petitioner's petition for a rehearing, and thereafter petitioner made application to, and secured an order from the Supreme Court of the State of Oklahoma staying execution for ninety days from and after March 27th, 1933 to file its petition for certiorari in the Supreme Court of the United States.

II.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. That the Supreme Court of Oklahoma erred in effect, in holding that under the Acts of Congress for the regulation of Interstate Commerce, that based upon the facts in this case, no notice was required of the respondents with reference to the cattle which were receipted for in

good order at the time they were delivered by the petitioner, and removed from its premises.

2. The Supreme Court of Oklahoma erred in holding in effect, with the trial court that notice as required by the contract might be waived.

3. The Supreme Court of Oklahoma erred in refusing to fully construe the uniform live stock contract involved in this case.

4. For the reason that the contract involved in this action is what is known as a Uniform Live Stock Contract, which is in use throughout the United States by carriers by rail, and was prepared, published and on file with the interstate commerce commission at the time the shipment involved herein originated, and also at this time, and the provisions of said contract with reference to notice should be construed by the Supreme Court of the United States in order to definitely determine as to whether or not it is valid, and if so, as to whether or not under the laws of Congress governing Interstate Commerce Commission, it can be waived.

WHEREFORE Your petitioner respectfully prays that a writ of certiorari be issued out of, and under the seal of this Honorable Court di-

rected to the Supreme Court of Oklahoma, commanding that court to certify and to send to this Court for its review and determination, upon a day certain, to be therein named, a full and complete transcript of the record and all of the proceedings in the cause entitled on its docket Number 20,751, Missouri Pacific Railroad Company, a corporation, Plaintiff in Error vs. Hartley Brothers, a co-partnership composed of F. M. Hartley and T. H. Hartley, Defendants in Error, and that the said judgment of the Supreme Court of Oklahoma may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

MISSOURI PACIFIC RAILROAD COMPANY,
a Corporation, Petitioner,

By EDWARD J. WHITE, and
THOMAS B. PRYOR,
its Counsel.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

OPINION OF THE COURT BELOW

The opinion of the court below has not as yet been officially reported in the Oklahoma Reports, but will be found at page 421 to 422½ of the transcript, and the portion of said opinion directly under attack is quoted in the concluding paragraph of subdivision one of petitioner's petition for writ of certiorari.

II.

JURISDICTION

This Court has jurisdiction to review this case, under the provisions of the Elkins Act as amended by an act to further regulate commerce with foreign nations and among the States, Feb. 19, 1903, as amended, U. S. Code, title 49, Section 41, 32 Stat. L., 847; 34 Stat. L., 548, and the Interstate Commerce Act, U. S. Code, title 49, Chapter 1, Section 20, as amended, 38 Stat. L., 1197; 44 Stat. L. 1446.

Since the record discloses that the shipments

out of which this litigation originated was in interstate commerce, and based upon what is known in railroad parlance as "uniform live stock contract", and said contract being admittedly published and on file in the office of the Interstate Commerce Commission at the time the shipment originated and under which it was delivered, and the pertinent portions of said contract, including the provisions sought to be construed in this case, which read:

> "Sec. 1. (a) Except in the case of its negligence proximately contributing thereto, no carrier or party in possession of all or any of the live stock herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, the inherent vice, weakness, or natural propensity of the animal or the act or default of the shipper or owner, or the agent of either, or by riots, strikes, stoppage of labor or threatened violence.

And

> "(b) Unless caused by the negligence of the carrier or its employees, no carrier shall be liable for or on account of any injury or death sustained by said live stock occasioned

by any of the following causes: Overloading, crowding one upon another, escaping from cars, pens, or vessels, kicking or goring or otherwise injuring themselves or each other, suffocation, fright or fire caused by the shipper or shippers' agent, heat or cold, changes in weather or delay caused by stress of weather or damage to or obstruction of track or other causes beyond the carrier's control.

And

"(c) Except in the case of its negligence proximately contributing thereto, no carrier shall be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done under quarrantine regulations or authorities, nor for detention, loss, or damage of any kind occasioned by quarantine laws or in the enforcement thereof; and the shipper shall hold the carrier harmless for any expense it may incur or damage it may be required to pay by reason thereof.

"Section 4, Paragraph (a). The shipper at his own risk and expense shall load and unload the live stock into and out of cars.

And

"(c) Before the live stock is removed

from the possession of the carrier or mingled with other live stock, the shipper, owner, consignee or agent thereof shall inform, in writing, the delivering carrier of any visible or manifest injury to the live stock."

This Court has jurisdiction to review the judgment of the Supreme Court of the State of Oklahoma, and to construe the provisions of the contract in the light of the Acts of Congress dealing with the question of interstate commerce.

III.

SPECIFICATION OF ASSIGNED ERRORS.

1. The Supreme Court of the State of Oklahoma erred in sustaining the trial court in giving in charge to the jury an instruction to the effect, that the requirement of notice under paragraph (c) of Section 4 of the uniform live stock contract, under certain conditions, may be waived.

2. The Supreme Court of the State of Oklahoma erred in holding, in effect, that paragraph (c) of Section 2 of the uniform live stock contract did not apply to the approximately fifty head of cattle which were admittedly receipted for at point of delivery, in good condition, and for which

no claim for loss or damage was filed within six months thereafter, and no notice of their intention to file a claim for same was given, the first demand made upon petitioner being when the suit was filed for damages for said stock ten and one half months after their delivery to respondents.

ARGUMENT

The facts leading up to the questions involved here, as indicated by the petition in error and statements heretofore made in this brief as supplemented by the record, discloses that the shipment of cattle in question, out of which this litigation arose, consisted of seven cars, four of which originated at Malvern, Arkansas on the Missouri Pacific Railroad lines, two at Leola, Arkansas on the Rock Island lines, and one at Ladelle on a small branch line; all of the cars in question finally being delivered to the petitioner at Little Rock, Arkansas, where the same were dipped preparatory to being transported from Little Rock, Arkansas to Delaware, Oklahoma. The Ladelle car went through without exceptions, and one of the other cars also went through without exceptions, and the last five cars, which were loaded with 293 head of stock were delivered at destination, and receipted for in good order, with the exception of ten head, which were noted as 'deads and downs'. The ten deads or downs which were noted on the receipt of the last five cars, plus those that died or were left in the dipping pens at Little Rock, Arkansas, showed a difference between the original number of cattle called for at the point of loading in the seven cars, and

between those that were checked out of the seven cars at Delaware, Oklahoma, of forty-six head.

The respondents, within about six weeks after the final delivery of the cattle, filed a claim for said forty-six head at $24.00 per head. The claim was not settled by the petitioner, since it included some injured and dead in the cars that originated on the Rock Island lines, and before they were delivered to the petitioner, and also those that died during the dipping period in the pens at Little Rock, for which the petitioner disclaimed liability under the terms of the contract.

No notice, under the terms of the contract was given the petitioner of their intention to file claim on any portion of the cattle which were receipted for at destination in good order, and no claim was filed prior to the commencement of this suit for the approximately fifty head which respondents sought and secured a recovery for in this action.

It is the contention of the petitioner that both the trial court and the Supreme Court of the State of Oklahoma erred in their refusal to give effect to the clauses of the contract which provides for the giving of notice and also in limiting the time to six months in which to file claim.

Dealing first with the legal effect of paragraph (c) of Section 4 of the uniform live stock contract, we beg to call the attention of the Court to the case of Reedy v. Mo. P. R. Co. (Kansas), opinion rendered July 9, 1927, paragraph two of the syllabus of which reads (255 Pac. 683):

> "An interstate live stock contract provides as a condition precedent to recovery of damages, that before the live stock is recovered from the possession of the carrier or mingled with other live stock, the shipper, owner or consignee, or the agent thereof, shall inform, in writing, the delivering carrier of any visible or manifest injury to the live stock. Held, the provision covers loss or damage to the live stock during transportation, and includes shrinkage in weight of the live stock during transportation."

And further held:

> "The burden is on the shipper to provide notice as provided in the contract, and if he fails to do so he cannot recover for loss or damage to the live stock during transportation."

And in the body of the opinion, the language

of the clause in the contract is quoted in full and exactly in the same language as the contract under consideration in this case. And in discussing same in the opinion, the court, among other things, said:

> "The provisions, however, covers loss or damage to the live stock during transportation and manifestly covers any shrinkage to the live stock during transportation. (Citing cases). It also covers animals that died or were crippled in transportation." (Citing cases.)

In the case of Manby v. Union Pacific R. Co., 10 Fed. (2nd Ed.), page 327, the legal effect of a provision as to notice of claims for damages contained in the shipper's contract is under consideration by the court, and the court held:

> "That filing of such claim (within the time specified in the contract) is a condition precedent to recovery."

And further held:

> "That shipper's letter to railroad general freight agent stating that shipment was diverted, and asking by whose authority sheep were delivered to person other than con-

signee, and his subsequent letter stating that he never authorized change of consignee, held not to satisfy bill of lading requirement that definite written claim, specifying character and amount of claim shall be made within four months after delivery should have been made."

And that:

"Shipper's oral conversation with the railroad's live stock agent respecting misdelivery was insufficient to satisfy bill of lading requirement for written notice of claim, or as a definite written claim specifying the character and amount of claim to be filed with the carrier's station agent at the point of origin or destination."

In the case of Davis v. Roper Lumber Co., 70 U.S. L. ed., page 209, and in the body of the opinion, the court, among other things, said:

"Respondent contended that under Section 10 of the Bill of Lading Act it was not necessary to comply with the requirements of the bill of lading. The point is without merit x x x x There is nothing in the statutory provisions relied on by respondent to excuse

failure to make claim within the time specified in the shippers' contract."

And in the case of Mo. P. R. v. Porter 171 U.S. L. ed., page 672, in the body of the opinion, the court, among other things, said:

"The general regulation of the issues, form and substance of bills of lading is broad enough to cover contractual provisions, like the one involved in this case, exempting railroads from liability for loss of shipper's property by fire etc."

And in the case of Abell v. A.T. & S. F. R. Co. (Kansas), 164 Pac. 269, the court in stating the law of the case in the syllabus, said:

"Where parties stipulated in a contract for an interstate shipment of live stock, that before there could be a recovery against the carrier for loss or injury to the stock occurring during transportation or previous to the unloading thereof, the shipper or his agent in charge of the cattle **must give writen notice of his claim to an officer of the company or the station agent before the stock are removed from the place** of destination, or before they are slaughtered or intermingled

with other stock. The carrier may not, under the federal law, waive the requirements of written notice of such claim by the shipper nor dispense with notice of a claim from one shipper and require it from another, **and without writen notice there can be no recovery, although the carrier may have had actual and complete notice of the claim of the shipper."**

The above syllabus is supported by a well-reasoned opinion, in which the reasons and purposes of the holding that provisions in shipper's contracts cannot be waived is discussed and supported by citation of authorities.

In the case of Southern R. Co. v. Prescott, 60 L. ed. U.S., page 836, the court, among other things, said:

"It is also clear that with respect to the service given by the federal statute, the parties were not at liberty to alter the terms of the service as fixed by the filed regulations. This has repeatedly been held with respect to rates, and to the established principles applied equally to any stipulation attempting to alter the provisions as fixed by the published rules relating to any of the services

within the purview of the act. This is the plain purpose of the statute in order to shut the door to all contrivances in violation of its provisions against preferences and discriminations."

In the court's instruction number 4, it will be noted that the clause of the contract copied by the court, provides that claims must be filed within six months, etc., and that notice of claim under certain conditions might be waived.

The five cars of cattle, out of which this suit originated, were delivered to the plaintiffs on May 14, 1927, and they commenced their action by the filing of their original petition in this case on April 3, 1928, almost ten and one-half months thereafter, and that the only written notice or claim which was filed in the meantime was the one filed with the defendant's agent at Delaware on June 30, 1927, said claim being for only forty-six head of cattle at $24.00 per head, whereas they sued, after the expiration of both six and nine months, for ninety-six head of cattle at $30.00 per head.

The defendant contends that taking the most favorable view of the contract as it affects the plaintiffs, that the most they could have legally

brought suit for was the forty-six head as originally claimed, and at a price of not to exceed $24.00 per head, and that instruction number 4 as given by the court was erroneous and prejudicial, both as to the giving of written notice of intended claim, and filing of claim, and the waiver thereof.

In the case of In Georgia F. & A. R. Co. v. Blish Mill Co., 60 L. ed. U.S., page 948, the court, in discussing a provision of interstate bill of lading which was being urged the carrier had waived, the court said:

> "The parties could not waive the terms of the contract under which the shipment was made pursuant to the federal act, nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to the conduct and hold the carrier to a different responsibility from that fixed by the agreement made under published tariffs and regulations. A different view would antagonize the plain violation of the act and open the door to the very abuse at which the act is aimed."

In the case of Dean v. Southern R. Co. (S.C.) 91 S.E., page 1042, the court, among other things, said:

"As a defense to the action, defendant alleged and the proof showed that plaintiff had not given written notice of his claim for damages in compliance with the following stipulation in the bill of lading, "that as a condition precedent to any right to recover any damages for loss or injury to said live stock, notice in writing of the claim thereof shall be given to the agent of the carrier actually delivering said live stock wherever such delivery may be made, and such notice shall be so given before said live stock is removed or is intermingled with other live stock", and against objection of the defendant, the court admitted testimony which plaintiff offered to show waiver of the written notice required by the stipulation, and instructed the jury that although the stipulation was valid and binding upon the parties, nevertheless it could be waived by the defendant, and submitted to them the question whether in fact it had been waived, and instructed them further that unless they found from the evidence that it had been waived their verdict should be for the defendant. While the exceptions challenged the correctness of other rulings and instructions, we need consider only the one above stated, as

that will be decisive of the case. (citing authorities), x x x but more recent decisions of the Supreme Court of the United States, whose decisions are controlling, show that such a stipulation in an interstate bill of lading, if valid and applicable, cannot be waived." (Citing authorities.)

In the case of M. K. & T. R. Co. v. Ward, 61 L. ed. U.S., page 1213, it was held:

"The shipper cannot waive the stipulations in such contracts any more than a carrier can."

The uniform live stock contract which was published and on file with the Interstate Commerce Commission at the time the shipment out of which this suit originated, assumed the status of a statute and fixed the relationship, rights and remedies of the parties to same, and the terms thereof could not be waived, abridged or set aside or modified by either the shipper or the carrier.

In the case of Pillsbury Flour Mills Co. v. Great Northern R. Co., 25 Fed. (2nd Ed.), page 66 (Eighth Circuit), the court, in the various paragraphs of the syllabus, lays down the rule in com-

pliance with the above suggestion. And in the body of the opinion the court said:

> "The rights of the shipper against the carrier are determined by the law through the provisions of the tariffs which are embodied in the applicable published rate. Citing B. & O. S.W. R. Co. v. Settle, 67 L. ed. U.S., page 189."

And:

> "The tariff, so long as it is of force, is, in respect of rates named, to be treated as though it were a statute binding as such upon the railroad and shipper alike." Citing cases.

And in discussing the matter of the construction of the rules and tariffs, section 501, 13 C.J., page 538, is quoted with approval, as follows:

> "Where, however, both the general and special provisions may be given reasonable effect, both are to be retained."

In the case of Beaumont S.L. & W. Ry. Co. v. Magnolia Provisions Co., et al., 26 Fed. (2nd Ed.), page 72, this court, in the body of the opinion, among other things, said:

> "The Supreme Court has held that a published tariff's rate is to be treated as though

it were a statute, binding both upon the carrier and the shipper, (citing authorities), and it is well settled by the Supreme Court decisions that these provisions of the law must be strictly complied with, because it is necessary to carry out the purposes of Congress to prevent unjust discrimination." (Citing authorities.)

And:

"The Interstate Commerce Commission announced the rule that proof of error in a publication of rates does not justify a departure from the published rates even though the shipper has full knowledge that the rate was published by mistake, and that decisions were cited with approval by the Supreme Court in the case of Davis v. Portland Seed Co., 68 L. ed. U.S., page 762."

The decision further holds, in effect, that the aggrieved parties' remedy is by application to the Interstate Commerce Commission for a correction or modification of the published tariffs and rules rather than attempt to evade same through the courts.

In the case of Douglas Shoe Co. v. Pere Marquette Co. (Mich.), 217 N.W., page 12 the court held:

"The fact that a carrier has actual knowledge of a shipper's loss, does not excuse the shipper from filing a claim."

CONCLUSION

We respectfully submit that the questions involved are important to the railroads of this country, since they seek a construction by this Court upon the provisions of the uniform live stock contract which is in universal use by all of the carriers by rail in connection with live stock movements in interstate commerce in this country; said contract having been prepared subsequent to the amendments of both the Elkins and Carmak Acts of Congress dealing with interstate commerce and the amendments thereto, and having been published and filed with the Interstate Commerce Commission, as required by the different Acts of Congress dealing with that subject; it being our contention that these provisions of the contract, under the law, as construed by the courts, are just as binding and effective as if they were Acts of Congress itself.

Respectfully submitted,

EDWARD J. WHITE,
THOMAS B. PRYOR,
Counsel for Petitioners.

INDEX

	Page
Concise Statement of the Case	1
Petition for Rehearing	11
Jurisdiction	14
Specifications of Assigned Errors	17
Argument and Brief	18

TABLE OF CASES

Abell v. A.T. & S.F. R. Co. (Kansas), 164 Pac. 269	26
B. & O. S.W. R. Co. v. Settle, 67 L. ed. U.S., 189	32
Beaumont S.L. & W. Ry. Co. v. Magnolia Provisions Co., et al., 26 Fed. (2nd Ed.), 72	32
Davis v. Roper Lumber Co., 70 U.S. L. ed., 209	25
Dean v. Southern R. Co. (S.C.), 91 S.E. 1042	29
Davis v. Portland Seed Co., 68 L. ed. U.S., 762	33
Douglas Shoe Co. v. Pere Marquette Co. (Mich.), 217 N.W., 12	34
Georgia F. & A. R. Co. v. Blish Mill Co., 60 L. ed. U.S., 948	29
Manby v. Union Pacific R. Co., 10 Fed. (2nd Ed.), 327	24
Mo. P. R. v. Porter, 171 U.S. L. ed., 672	26
M. K. & T. R. Co. v. Ward, 61 L. ed. U.S., 1213	31
Opinion Reported in 162 Okla., P. 194	9
Pillsbury Flour Mills Co. v. Great Northern R. Co., 25 Fed. (2nd Ed.), 63	31
Reedy v. Mo. P. R. Co. (Kansas), 255 Pac. 683	23
34 Stat. L., 548, and the Interstate Commerce Act, U. S. Code, title 49, Chapter 1, Section 20, as amended, 38 Stat. L., 1197	14
44 Stat. L. 1446. Also Sec. 237 Judicial Code (U.S.C.S. 344) as amended. Act of February 13, 1925, Ch. 229, 43 Stat. 937)	14
Section 501, 13 C.J., page 538	32
Southern R. Co. v. Prescott, 60 L. ed. U.S., 836	27
U. S. Code, title 49, Section 41, 32 Stat. L., 847	14

No. 200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

MISSOURI PACIFIC RAILROAD COMPANY, a Corporation ..... Petitioner

vs.

HARTLEY BROTHERS, a Co-partnership composed of F. M. Hartley and T. H. Hartley ..... Respondents

---

BRIEF FOR PETITIONER

CONCISE STATEMENT OF CASE.

The Supreme Court of the State of Oklahoma, being the highest court of the State in which a judgment could be had, has affirmed the judgment of the District Court of the County of Rogers, in the State of Oklahoma, in favor of the respondents and against the petitioner. (Tr. 156-158).

The action was brought by the respondents (plaintiff) against the petitioner (defendant) (Tr. 3-4) to recover damages on account of injury to certain cattle involved in the shipment of seven car loads from certain counties in the State of Arkansas to Delaware, in the State of Oklahoma, said cattle being from what is commonly designated as quarantined territory into unquarantined territory with a provision for the unloading of said cattle at the stock pens at Little Rock, Arkansas for dipping. All of the different seven cars moved under the provisions of what is known as the uniform live stock contract, and involved ninety-four head of cattle out of five of the seven cars, forty-four head of which were alleged to have died either prior to the unloading of same at Little Rock for dipping, during the period of dipping, or between Little Rock, Arkansas, and Delaware, Oklahoma. Fifty head of said cattle were alleged to have died after the cattle was removed from the cars and the stock pens of the defendant to pasturage some seven miles away. Respondents further allege that the negligent handling of these cattle resulted in this loss.

Petitioner filed its answer to the petition of respondents, paragraphs two and three of which reads (Tr. 5-6):

"That if the shipment of live stock moved over the railroad of the defendant, as alleged in said petition, that said live stock or cattle, and each and every car thereof, moved under a special live stock contract, which prior to the date of shipment had been filed with the Interstate Commerce Commission, and that under and by virtue of the provisions of said live stock contract, that said defendant did not assume any liability because of the inherent weakness and the poor, thin and weak condition of said cattle, and for injury to same resulting in the over-crowding of them in the cars, and resulting from the stoppage in transit for dipping, nor for the loss of life or injury of said cattle while upon the lines of the original connecting carrier, and that if said plaintiffs lost the number of said cattle as alleged in their petition, that said loss was directly the result of the poor, thin and weak condition of the cattle, and of the over-crowding of same in cars, and from the results of dipping said cattle immediately before shipment at Little Rock in transit, and from loss occurring on original connecting carrier's line and prior to the delivery of said cattle to this defendant, all of which is especially plead as a bar to plaintiffs' right of recovery herein.

"The live stock contract hereinabove referred to, the duplicate originals of which were delivered to and should be in the possession of plaintiffs, provide among other things, 'that before live stock is removed from the possession of the carrier or mingled with other live stock, the shipper, owner, consignee or agent thereof shall inform, in writing, the delivering carrier of any visible or manifest injury to the live stock'; and that no such written notice was given or served upon the defendant in connection with the several car loads of cattle upon which the plaintiff's alleged cause of action is predicated, and especially as to the fifty head of cattle which it is alleged died after being removed to and placed upon pasture. And the above clause in the shipper's contract and in the tariffs governing the movement of such cattle is also especially plead as a bar to plaintiffs' right of recovery herein."

To the answer of the petitioner the respondents filed a general denial, and also a special denial which reads (Tr. 6-7):

"They deny that they failed to give notice to the defendant herein of the injury to said cattle under and by virtue of the pro-

visions of said live stock contract referred to in the answer, and in this connection further state that in the event they did fail to give such notice, that the defendant corporation knew of the injured condition of said cattle and had an agent present at the time said cattle were unloaded at Delaware, Oklahoma, and has had full and complete knowledge of said injured condition of said cattle as these plaintiffs, and that no necessity existed for the giving of said notice. These plaintiffs state further that if they failed to give such notice, the failure to do so has been waived by the defendant by accepting a written claim thereafter on the part of these plaintiffs and considering the same and disallowing the same upon the grounds other than the failure to give such notice as the defendant pleads is necessary to be given."

During the progress of the trial of the case the uniform live stock contract pertaining to each of the cars of cattle involved were offered and admitted in evidence without objection (Tr. 83), and with reference thereto attorneys for both the petitioner and respondents stipulated over their signatures as follows (Tr. 114):

"It is hereby stipulated by and between

the attorneys for both plaintiffs and defendant that the uniform live stock contracts offered and admitted in evidence as to each of the cars of cattle in question, were at the time of the execution of same published and on file with the Interstate Commerce Commission and that the same may be used in this case without being formally certified by the Secretary of the Interstate Commerce Commission."

Each of said contracts contain provisions which read (Tr. 88-89):

"Section 2. (c) Claims for loss, damage or injury to live stock must be made in writing to the originating or delivering carrier or carriers issuing this bill of lading within six months after the delivery of the live stock (or, in case of export traffic within nine months after delivery at port of export) or, in case of failure to make delivery, then within six months (or nine months in case of export traffic) after a reasonable time for delivery had elapsed; provided, that if such loss, damage or injury was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of

claim shall be required as a condition precedent to recovery."

"Section 4. (c) Before the live stock is removed from the possession of the carrier or mingled with other live stock, the shipper, owner, consignee or agent thereof shall inform, in writing, the delivering carrier of any visible or manifest injury to the live stock."

The respondent, T. H. Hartley, among other things, testified (Tr. 48) that following the delivery of the cattle contained in the shipments referred to, he filed a claim with the petitioner (Tr. 49), the claim was for 46 head of cattle at $24.00 per head including freight, or $1104.00, this being the number of cattle which respondents claimed was short against the checking of said shipments at the point of origin and at the point of delivery.

The agent of the petitioner at the point of delivery (Tr. 122-131) identified receipts executed by the consignee, as shown by the live stock contracts, whom it appears from the testimony during the progress of the trial, was agent for the respondents, in which all of the cattle involved in the different shipments, except those for which the claim referred to above was filed, was receipted

for, which receipt, among other things, provides (Tr. 122-131):

"Received in good order for account of consignee" and specifying the number of cattle actually received. But included in their suit for damages was fifty additional head of cattle, which they allege died after they were carried out to respondent's pasture."

No written notice of any kind was ever served on petitioner, and no claim was ever made prior to the commencement of this action, which was more than eleven months after the delivery of the cattle, for the fifty head which had been receipted for in good order upon their delivery at destination.

The trial court, over the objections of petitioner, in connection with the provisions of the live stock contract, instructed the jury, among other things, as follows (Tr. 147-148):

"And you are further instructed that if you find from the testimony that the plaintiffs failed to comply with the contract by informing the defendant, in writing, of any visible or manifest injury to that portion of the live stock which the plaintiffs allege died subsequent to their removal from the posses-

sion of the defendant, then and in that event the plaintiffs cannot recover as to any of said live stock thereafter dying, or for any injury thereto.

"However, you are further instructed that the notice as provided for in said contract **may in certain cases be waived**, and, in the event that you should find under the facts and circumstances in this particular case that the said injuries complained of were visible and manifest and could have been observed by the station agent by the exercise of ordinary ability, then and in that event the said notice would not have to be served upon the said defendant as provided for in said contract."

The jury returned a verdict in favor of respondents for $1750.00 (Tr. 151). Motion for new trial was filed (Tr. 151-152), in which the court's attention was particularly called to the instruction quoted above. The motion for new trial was overruled, and petitioner appealed the case to the Supreme Court of the State of Oklahoma, which said Court, on the 20th day of December, 1932, filed its opinion (Tr. 156-158), reported in 162 Okla. p. 194, in which the judgment of the

trial court was affirmed, paragraph two of the syllabus of the opinion, reads:

> "Under a uniform shipper's contract based upon the Act of Congress March 4, 1915, 38 Stat. at Large 1196, amendatory of former Acts, a plaintiff is not required to file a claim within the time specified in the contract where the loss or damage for which recovery is sought occurred while a shipment of cattle was in transit as a result of the carelessness or negligence of the carrier."

And in the body of the opinion, the Court says:

> "It is our view that a decision as to waiving of notice in the contract presented is not necessary to the determination of this cause for the recovery herein sought was for damage in transit occasioned by the negligence and carelessness of the defendant carrier."

The shipment out of which this litigation originated was contracted for on May 4, 1927 (Tr. 4), and was delivered at destination by petitioner May 14, 1927 (Tr. 123-131). Claim for the loss of 46 head of the cattle involved in said shipment was filed with petitioning carrier June 30, 1927

(Tr. 49). Suit was commenced by respondents to recover for the loss of the 46 head plus 46 additional head on April 3, 1928, and amended petition was filed May 29, 1928 (Tr. 3).

II.

Following the filing of the Supreme Court's opinion, and within the time provided by the rules of the court, the petitioner filed its petition for rehearing, in which the errors of the Supreme Court of the State of Oklahoma were given in the following assignments (Tr. 158-160):

"1. The court erred in finding as a matter of fact, and in holding as a matter of law, that based upon the evidence in this case, as disclosed by the record, that it was not necessary for the defendants in error to comply with the provisions of the uniform live stock contract forming the basis of this action, by giving to the plaintiff in error notice of injury to the cattle in question before removing the same from the plaintiff in error's premises, or permitting them to co-mingle with the other cattle.

"2. The court erred in disregarding, as

a matter of fact, and failing to give effect to the undisputed testimony that the cattle which died after delivery to the defendant in error and removed from the plaintiff in error's premises were receipted for by the defendants in error at the time of said delivery, as being in good condition and without exception.

"3. The court erred in holding, as a matter of law, that the undisputed fact that the original claim was filed by the defendants in error covering the cattle injured and dead prior to the delivery when taken in connection with their failure to file an amended or supplemental claim within nine months thereafter for the remaining 50 head of cattle forming the basis of this action was without any probative force in estopping the defendants in error from enlarging said claim by suit to cover the additional 50 head which was receipted for in good condition and removed from plaintiff in error's premises, and alleged in the suit to have died thereafter.

"4. The court erred in holding, as a matter of law, that the trial court did not err in instructing the jury that the provisions of the uniform live stock contract under which the

shipment in question were transported, and which was a part of the tariffs in force and on file with the Interstate Commerce Commission, could be waived.

"5. The court erred in finding and holding, as a matter of law, that the provisions of the uniform live stock contract above referred to, which provides that under certain conditions the claim for loss or damage must be filed within nine months after date of delivery was not effective as a defense to that portion of the shipment which was receipted for by the defendants in error in good condition and removed from plaintiff in error's premises, and which was included after the expiration of nine months, and which was not covered by the original claim."

Thereafter and on February 28th, 1933 (Tr. 160), the Supreme Court of the State of Oklahoma overruled and denied petitioner's petition for a rehearing, and thereafter petitioner made application to, and secured an order from the Supreme Court of the State of Oklahoma staying execution for ninety days from and after March 27th, 1933 to file its petition for certiorari in the Supreme Court of the United States.

III.

JURISDICTION

This Court has jurisdiction to review this case, under the provisions of the Elkins Act as amended by an act to further regulate commerce with foreign nations and among the States, Feb. 19, 1903, as amended, U. S. Code, title 49, Section 41, 32 Stat. L., 847; 34 Stat. L., 548, and the Interstate Commerce Act, U. S. Code, title 49, Chapter 1, Section 20, as amended, 38 Stat. L., 1197; 44 Stat. L. 1446. Also Sec. 237 Judicial Code (U.S.C.S. 344) (as amended, Act of February 13, 1925, Ch. 229, 43 Stat. 937.)

Since the record discloses that the shipments out of which this litigation originated was in interstate commerce, and based upon what is known in railroad parlance as "uniform live stock contract", and said contract being admittedly published and on file in the office of the Interstate Commerce Commission at the time the shipment originated and under which it was delivered, and the pertinent portions of said contract, including the provisions sought to be construed in this case, which read:

"Sec. 1. (a) Except in the case of its negligence proximately contributing thereto,

no carrier or party in possession of all or any of the live stock herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, the inherent vice, weakness, or natural propensity of the animal or the act or default of the shipper or owner, or the agent of either, or by riots, strikes, stoppage of labor or threatened violence.

And

"(b) Unless caused by the negligence of the carrier or its employees, no carrier shall be liable for or on account of any injury or death sustained by said live stock occasioned by any of the following causes: Overloading, crowding one upon another, escaping from cars, pens, or vessels, kicking or goring or otherwise injuring themselves or each other, suffocation, fright or fire caused by the shipper or shippers' agent, heat or cold, changes in weather or delay caused by stress of weather or damage to or obstruction of track or other causes beyond the carrier's control.

And

"(c) Except in the case of its negligence

proximately contributing thereto, no carrier shall be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done under quarantine regulations or authorities, nor for detention, loss, or damage of any kind occasioned by quarantine laws or in the enforcement thereof; and the shipper shall hold the carrier harmless for any expense it may incur or damage it may be required to pay by reason thereof.

"Section 4, Paragraph (a). The shipper at his own risk and expense shall load and unload the live stock into and out of cars.

And

"(c) Before the live stock is removed from the possession of the carrier or mingled with other live stock, the shipper, owner, consignee or agent thereof shall inform, in writing, the delivering carrier of any visible or manifest injury to the live stock."

This Court has jurisdiction to review the judgment of the Supreme Court of the State of Oklahoma, and to construe the provisions of the contract in the light of the Acts of Congress dealing with the question of interstate commerce.

IV.

SPECIFICATION OF ASSIGNED ERRORS

1. The Supreme Court of the State of Oklahoma erred in sustaining the trial court in giving in charge to the jury an instruction to the effect, that the requirement of notice under paragraph (c) of Section 4 of the uniform live stock contract, under certain conditions, may be waived.

2. The Supreme Court of the State of Oklahoma erred in holding, in effect, that paragraph (c) of Section 2 of the uniform live stock contract did not apply to the approximately fifty head of cattle which were admittedly receipted for at point of delivery, in good condition, and for which no claim for loss or damage was filed within six months thereafter, and no notice of their intention to file a claim for same was given, the first demand made upon petitioner being when the suit was filed for damages for said stock ten and one half months after their delivery to respondents.

ARGUMENT AND BRIEF

The facts leading up to the questions involved here, as indicated by the petition in error and statements heretofore made in this brief as supplemented by the record, discloses that the shipment of cattle in question, out of which this litigation arose, consisted of seven cars, four of which originated at Malvern, Arkansas on the Missouri Pacific Railroad lines, two at Leola, Arkansas on the Rock Island lines, and one at Ladelle on a small branch line; all of the cars in question finally being delivered to the petitioner at Little Rock, Arkansas, where the same were dipped preparatory to being transported from Little Rock, Arkansas to Delaware, Oklahoma. The Ladelle car went through without exceptions, and one of the other cars also went through without exceptions, and the last five cars, which were loaded with 293 head of stock were delivered at destination, and receipted for in good order, with the exception of ten head, which were noted as 'deads and downs'. The ten deads or downs which were noted on the receipt of the last five cars, plus those that died or were left in the dipping pens at Little Rock, Arkansas, showed a difference between the original number of cattle called for at the point of loading in the seven cars, and

between those that were checked out of the seven cars at Delaware, Oklahoma, of forty-six head.

The respondents, within about six weeks after the final delivery of the cattle, filed a claim for said forty-six head at $24.00 per head. The claim was not settled by the petitioner, since it included some injured and dead in the cars that originated on the Rock Island lines, and before they were delivered to the petitioner, and also those that died during the dipping period in the pens at Little Rock, for which the petitioner disclaimed liability under the terms of the contract.

No notice, under the terms of the contract was given the petitioner of their intention to file claim on any portion of the cattle which were receipted for at destination in good order, and no claim was filed prior to the commencement of this suit for the approximately fifty head which respondents sought and secured a recovery for in this action.

It is the contention of the petitioner that both the trial court and the Supreme Court of the State of Oklahoma erred in their refusal to give effect to the clauses of the contract which provides for the giving of notice and also in limiting the time to six months in which to file claim.

The particular portion of the contract referred to being section 2 (c), which reads (Tr. 88):

"Claims for loss, damage, or injury to live stock must be made in writing to the originating or delivering carrier or carriers issuing this bill of lading within six months after the the delivery of the live stock (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within six months (or nine months in case of export traffic) after a reasonable time for delivery has elapsed; provided, that if such loss, damage or injury was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery. Suits for loss, damage, injury or delay shall be instituted only within two years and one day after delivery of the live stock, or in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed; or Provided, that in case of the claim on which suit is made was based in writing within six months, or nine months in case of export traffic (whether or not filing of such claim is re-

quired as a condition precedent to recovery) suit shall be instituted not later than two years and one day after notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof, specified in the notice."

And when taken in connection with instruction number 4, which was given in charge to the jury by the trial court, over the exceptions of petitioner and confirmed by the Supreme Court of the State of Oklahoma, to which appropriate assignments of error is directed, said instruction Number 4 referred to being as follows (Tr. 147-148):

"4. There is a further provision in said contract as follows:

"Section 2. (c) Claims for loss, damage, or injury to live stock must be made in writing to the originating or delivering carrier or carriers issuing this bill of lading within six months after the delivery of the live stock (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within six months (or nine months in case of export traffic) after a reasonable time for deliv-

ery has elapsed; provided, that if such loss, damage or injury was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

"And you are further instructed that if you find from the testimony that the plaintiffs failed to comply with the contract by informing the defendant, in writing, of any visible or manifest injury to that portion of the live stock which plaintiffs allege died, subsequent to their removal from the possession of the defendant, then and in that event the plaintiffs cannot recover as to any of said live stock thereafter dying, or for any injury theerto.

"However, you are further instructed that the notice as provided for in said contract may in certain cases be waived, and, in the event that you should find under the facts and circumstances in this particular case that the said injuries complained of were visible and manifest and could have been observed by the station agent by the exercise of ordinary ability, then and in that event the said notice would not have to be served upon the said defendant as provided for in said contract."

presents the legal questions involved in petitioner's assignments of error.

Dealing first with the legal effect of paragraph (c) of Section 4 of the uniform live stock contract, we beg to call the attention of the Court to the case of Reedy v. Mo. P. R. Co. (Kansas), opinion rendered July 9, 1927, paragraph two of the syllabus of which reads (255 Pac. 683):

> "An interstate live stock contract provides as a condition precedent to recovery of damages, that before the live stock is recovered from the possession of the carrier or mingled with other live stock, the shipper, owner or consignee, or the agent thereof, shall inform, in writing, the delivering carrier of any visible or manifest injury to the live stock. Held, the provision covers loss or damage to the live stock during transportation, and includes shrinkage in weight of the live stock during transportation."

And further held:

> "The burden is on the shipper to provide notice as provided in the contract, and if he fails to do so he cannot recover for loss or damage to the live stock during transportation."

And in the body of the opinion, the language of the clause in the contract is quoted in full and exactly in the same language as the contract under consideration in this case. And in discussing same in the opinion, the court, among other things, said:

> "The provisions, however, covers loss or damage to the live stock during transportation and manifestly covers any shrinkage to the live stock during transportation. (Citing cases). It also covers animals that died or were crippled in transportation." (Citing cases.)

In the case of Manby v. Union Pacific R. Co., 10 Fed. (2nd Ed.), page 327, the legal effect of a provision as to notice of claims for damages contained in the shipper's contract is under consideration by the court, and the court held:

> "That filing of such claim (within the time specified in the contract) is a condition precedent to recovery."

And further held:

> "That shipper's letter to railroad general freight agent stating that shipment was diverted, and asking by whose authority sheep

were delivered to person other than consignee, and his subsequent letter stating that he never authorized change of consignee, held not to satisfy bill of lading requirement that definite written claim, specifying character and amount of claim shall be made within four months after delivery should have been made."

And that:

"Shipper's oral conversation with the railroad's live stock agent respecting misdelivery was insufficient to satisfy bill of lading requirement for written notice of claim, or as a definite written claim specifying the character and amount of claim to be filed with the carrier's station agent at the point of origin or destination."

In the case of Davis v. Roper Lumber Co., 70 U.S. L. ed., page 209, and in the body of the opinion, the court, among other things, said:

"Respondent contended that under Section 10 of the Bill of Lading Act it was not necessary to comply with the requirements of the bill of lading. The point is without merit. x x x x There is nothing in the statutory provisions relied on by respondent to excuse

failure to make claim within the time specified in the shippers' contract."

And in the case of Mo. P. R. v. Porter, 171 U.S. L. ed., page 672, in the body of the opinion, the court, among other things, said:

"The general regulation of the issues, form and substance of bills of lading is broad enough to cover contractual provisions, like the one involved in this case, exempting railroads from liability for loss of shipper's property by fire etc."

And in the case of Abell v. A.T. & S. F. R. Co. (Kansas), 164 Pac. 269, the court in stating the law of the case in the syllabus, said:

"Where parties stipulated in a contract for an interstate shipment of live stock, that before there could be a recovery against the carrier for loss or injury to the stock occurring during transportation or previous to the unloading thereof, the shipper or his agent in charge of the cattle must give written notice of his claim to an officer of the company or the station agent before the stock are removed from the place of destination, or before they are slaughtered or intermingled

with other stock. The carrier may not, under the federal law, waive the requirements of written notice of such claim by the shipper nor dispense with notice of a claim from one shipper and require it from another, and without written notice there can be no recovery, although the carrier may have had actual and complete notice of the claim of the shipper."

The above syllabus is supported by a well-reasoned opinion, in which the reasons and purposes of the holding that provisions in shipper's contracts cannot be waived is discussed and supported by citation of authorities.

In the case of Southern R. Co. v. Prescott, 60 L. ed. U.S., page 836, the court, among other things, said:

"It is also clear that with respect to the service given by the federal statute, the parties were not at liberty to alter the terms of the service as fixed by the filed regulations. This has repeatedly been held with respect to rates, and to the established principles applied equally to any stipulation attempting to alter the provisions as fixed by the published rules relating to any of the services

within the purview of the act. This is the plain purpose of the statute in order to shut the door to all contrivances in violation of its provisions against preferences and discriminations."

In the court's instruction number 4, it will be noted that the clause of the contract copied by the court, provides that claims must be filed within six months, etc., and that notice of claim under certain conditions might be waived.

The five cars of cattle, out of which this suit originated, were delivered to the plaintiffs on May 14, 1927, and they commenced their action by the filing of their original petition in this case on April 3, 1928, almost ten and one-half months thereafter, and that the only written notice or claim which was filed in the meantime was the one filed with the defendant's agent at Delaware on June 30, 1927, said claim being for only forty-six head of cattle at $24.00 per head, whereas they sued, after the expiration of both six and nine months, for ninety-six head of cattle at $30.00 per head.

The defendant contends that taking the most favorable view of the contract as it affects the plaintiffs, that the most they could have legally

brought suit for was the forty-six head as originally claimed, and at a price of not to exceed $24.00 per head, and that instruction number 4 as given by the court was erroneous and prejudicial, both as to the giving of written notice of intended claim, and filing of claim, and the waiver thereof.

In the case of In Georgia F. & A. R. Co. v. Blish Mill Co., 60 L. ed. U.S., page 948, the court, in discussing a provision of interstate bill of lading which was being urged the carrier had waived, the court said:

> "The parties could not waive the terms of the contract under which the shipment was made pursuant to the federal act, nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to the conduct and hold the carrier to a different responsibility from that fixed by the agreement made under published tariffs and regulations. A different view would antagonize the plain violation of the act and open the door to the very abuse at which the act is aimed."

In the case of Dean v. Southern R. Co. (S.C.) 91 S.E., page 1042, the court, among other things, said:

"As a defense to the action, defendant alleged and the proof showed that plaintiff had not given written notice of his claim for damages in compliance with the following stipulation in the bill of lading, "that as a condition precedent to any right to recover any damages for loss or injury to said live stock, notice in writing of the claim thereof shall be given to the agent of the carrier actually delivering said live stock wherever such delivery may be made, and such notice shall be so given before said live stock is removed or is intermingled with other live stock", and against objection of the defendant, the court admitted testimony which plaintiff offered to show waiver of the written notice required by the stipulation, and instructed the jury that although the stipulation was valid and binding upon the parties, nevertheless it could be waived by the defendant, and submitted to them the question whether in fact it had been waived, and instructed them further that unless they found from the evidence that it had been waived their verdict should be for the defendant. While the exceptions challenged the correctness of other rulings and instructions, we need consider only the one above stated, as

that will be decisive of the case. (citing authorities), x x x but more recent decisions of the Supreme Court of the United States, whose decisions are controlling, show that such a stipulation in an interstate bill of lading, if valid and applicable, cannot be waived." (Citing authorities.)

In the case of M. K. & T. R. Co. v. Ward, 61 L. ed. U.S., page 1213, it was held:

"The shipper cannot waive the stipulations in such contracts any more than a carrier can."

The uniform live stock contract which was published and on file with the Interstate Commerce Commission at the time the shipment out of which this suit originated, assumed the status of a statute and fixed the relationship, rights and remedies of the parties to same, and the terms thereof could not be waived, abridged or set aside or modified by either the shipper or the carrier.

In the case of Pillsbury Flour Mills Co. v. Great Northern R. Co., 25 Fed. (2nd Ed.), page 66 (Eighth Circuit), the court, in the various paragraphs of the syllabus, lays down the rule in com-

pliance with the above suggestion. And in the body of the opinion the court said:

> "The rights of the shipper against the carrier are determined by the law through the provisions of the tariffs which are embodied in the applicable published rate. Citing B. & O. S.W. R. Co. v. Settle, 67 L. ed. U.S., page 189."

And:

> "The tariff, so long as it is of force, is, in respect of rates named, to be treated as though it were a statute binding as such upon the railroad and shipper alike." Citing cases.

And in discussing the matter of the construction of the rules and tariffs, section 501, 13 C.J., page 538, is quoted with approval, as follows:

> "Where, however, both the general and special provisions may be given reasonable effect, both are to be retained."

In the case of Beaumont S.L. & W. Ry. Co. v. Magnolia Provisions Co., et al., 26 Fed. (2nd Ed.), page 72, this court, in the body of the opinion, among other things, said:

"The Supreme Court has held that a published tariff's rate is to be treated as though it were a statute, binding both upon the carrier and the shipper, (citing authorities), and it is well settled by the Supreme Court decisions that these provisions of the law must be strictly complied with, because it is necesary to carry out the purposes of Congress to prevent unjust discrimination." (Citing authorities.)

And:

"The Interstate Commerce Commission announced the rule that proof of error in a publication of rates does not justify a departure from the published rates even though the shipper has full knowledge that the rate was published by mistake, and that decisions were cited with approval by the Supreme Court in the case of Davis v. Portland Seed Co., 68 L. ed. U.S., page 762."

The decision further holds, in effect, that the aggrieved parties' remedy is by application to the Interstate Commerce Commission for a correction or modification of the published tariffs and rules rather than attempt to evade same through the courts.

In the case of Douglas Shoe Co. v. Pere Marquette Co. (Mich.), 217 N.W., page 12 the court held:

> "The fact that a carrier has actual knowledge of a shipper's loss, does not excuse the shipper from filing a claim."

CONCLUSION

We respectfully submit that the questions involved are important to the railroads of this country, since they seek a construction by this Court upon the provisions of the uniform live stock contract which is in universal use by all of the carriers by rail in connection with live stock movements in interstate commerce in this country; said contract having been prepared subsequent to the amendments of both the Elkins and Carmack Acts of Congress dealing with interstate commerce and the amendments thereto, and having been published and filed with the Interstate Commerce Commission, as required by the different Acts of Congress dealing with that subject; it being our contention that these provisions of

the contract, under the law, as construed by the courts, are just as binding and effective as if they were Acts of Congress itself.

Respectfully submitted,

EDWARD J. WHITE,
THOMAS B. PRYOR,
Counsel for Petitioners.

INDEX.

Page

CONCISE STATEMENT OF CASE 1
JURISDICTION 4
BRIEF AND ARGUMENT 4
CONCLUSION 13

STATUTES CITED AND QUOTED.

Chapter 104, sec. 20, 24 Stat. at L. 379-386 6
Chapter 176, sec. 1, 33 Stat. at L. 1196-1199 (49 U. S. C. A. 20 (11)), ... 5
Chapter 3591, sec. 7, 34 Stat. at L. 584-595 6

CASES CITED.

Am. Ry. Express Co. vs. Rouw, 173 Ark. 810, 294 S. W. 401 13

Barrett vs. Van Pelt, 268 U. S. 85, 45 S. Ct. 437, 69 L. Ed. 857 4

C. & O. Ry. Co. vs. Thompson, 270 U. S. 416, 46 S. Ct. 318, 70 L. Ed. 659 5

Deming vs. M.-K.-T. Ry. Co., 138 Okla. 276, 281 Pac. 240. 11
Davis vs. Roper, 269 U. S. 158, 46 S. Ct. 28, 70 L. Ed. 207, 44 A. L. R. 1357 5

Evans vs. A. T. & S. F. Ry. Co., — N. M. —, 20 Pac. (2d) 932 8
Erie Ry. Co. vs. Callahan Co., — Ind. —, 184 N. E. 264, .. 8

Page

Forkner vs. Louisville & N. Ry. Co., 232 Ky. 579, 24 S. W. (2d) 290 8

Hicklin vs. Central of Ga. Ry. Co., 40 Ga. A. 297, 149 S. E. 286 8
Hill vs. Great Northern Ry. Co., 156 Wash. 567, 287 Pac. 665 8
Hailey vs. Oregon Short Line Ry. Co., 253 Fed. 569 13
Hunt vs. Hines, Director General, 204 Mo. A. 318, 223 S. W. 789 13

Louis Ilfeld Co. vs. Southern Pac. Co., (C. C. A. 10th Cir.) 48 Fed. (2d) 1056 8

Northern Pac. Ry. Co. vs. Wall, 241 U. S. 87, 60 L. Ed. 905, 36 Sup. Ct. Rep. 493 7

Radousky vs. N. Y., N. H. & H. Ry. Co., 258 Mass. 26, 154 N. E. 334 13

Southern Pacific Co. vs. Di Cristina, 36 Ga. A. 433, 137 S. E. 79 11

Wichita Valley Ry. Co. vs. Baldwin, — Tex. Civ. A. —, 270 S. W. 1089 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

MISSOURI PACIFIC RAILROAD COMPANY, a Corporation,

Petitioner,

vs.

HARTLEY BROTHERS, a Co-partnership composed of F. M. Hartley and T. H. Hartley,

Respondents.

NO. 200.

BRIEF FOR RESPONDENTS.

CONCISE STATEMENT OF CASE.

The Supreme Court of Oklahoma, the court of last resort in said state, having affirmed the judgment of the district court of Rogers County, Oklahoma, in an opinion delivered December 20, 1932 (Tr. 156-158), 162 Okla. 194, 19 Pac. (2d) 337, and this Court having granted a writ of certiorari (Tr. 167) upon petition of the railroad company, on October 9, 1933, and the petitioner having filed a brief herein, it becomes our duty to file a brief on behalf of respondents.

We do not feel that the portion of the "Concise Statement of Case" on page 2 of petitioner's brief correctly

gives the import of the respondents' petition filed in the district court of Rogers County, Oklahoma. That portion of said statement implying that we alleged a certain number of our cattle came into petitioner's possession is correct. We followed this allegation with an allegation of the infliction by petitioner of certain injuries upon these cattle and the manner in which this was done, as is shown by the following quotation of that portion of our petition (Tr. 4):

"That the defendant railroad corporation was negligent and careless in the transportation of said cattle in that the train on which they were transported was jerked about and shunted to and fro in such a manner that the cattle were thrown from their feet onto the floors of the cars and were trampled upon by other cattle, and by reason of such rough handling and carelessness and negligence on the part of the said railroad corporation in transporting said cattle, the said cattle were bruised, skinned, maimed, lamed, and their bones broken and at the time said cattle were delivered to these plaintiffs at Delaware, Oklahoma, and unloaded from said cars, 42 head of said cattle were dead and more than 50 head of said cattle were in such physical condition (fols. 31 and 32) that these plaintiffs were required to haul said cattle from said railroad cars to these plaintiffs' ranch and thereafter 50 head of said cattle died as a result of the injuries received while being transported by said railroad corporation as aforesaid. That the injuries to and death of said cattle were the direct and approximate result of the rough, negligent and careless manner in which said cattle were transported by said Missouri-Pacific Railroad Company, and not as a result of any act on the part of these plaintiffs."

We pleaded the total number of our injured cattle at the time of delivery at Delaware, Oklahoma, as being 92.

We did not plead a series of periods at which there were different numbers affected by different injuries from different causes, as is implied in petitioner's statement.

We especially disclaim any effort to recover for any cattle, if any, lost by dipping, disease, inherent weakness, or any other cause than "carelessness and negligence of the petitioner in the transportation of said cattle while they were actually in transit."

We direct attention to the testimony of Dow Rana (Tr. 10-11-12) as to the number of cattle dead when unloaded at Little Rock, Arkansas, at the completion of a journey from Malvern, Arkansas, a distance of only 40 miles, and whose appearance on arrival at destination was that of cattle "badly bruised and tramped." We direct attention to the testimony of Dow Rana (Tr. 15-18) for the details of the journey from Little Rock, Arkansas, to Delaware, Oklahoma, with a short stop-over at Van Buren, Arkansas, in which is affirmatively established the carelessness and negligence of the petitioner in the handling of said cattle in transit. We direct attention to the testimony of Dow Rana (Tr. 20) and of T. H. Hartley, one of the respondents (Tr. 41-44), as to the condition of the cattle at the time they were unloaded at Delaware, Oklahoma. We direct attention to the testimony of the witness Dow Rana (Tr. 20) and of T. H. Hartley (Tr. 41-44) as to the number of dead at the time they were unloaded at

Delaware, Oklahoma; and the testimony of T. H. Hartley (Tr. 42-44) and the witness Fred Sharp (Tr. 67-68), to whose pasture the cattle were removed, as to the numbers which died immediately after removal from the train and pens to the pasture. We direct attention to the testimony of the witness T. H. Hartley (Tr. 44) as to the value of the cattle which died as the result of such injuries.

We say that all of this is ample to support the verdict of the jury in this case for $1750.00.

JURISDICTION.

This was a shipment of livestock between a point in the State of Arkansas and a point in the State of Oklahoma, and in our judgment constitutes interstate commerce. It was made under the terms and provisions of a uniform livestock contract prescribed by the Interstate Commerce Commission and adopted March 15, 1922. We, therefore, believe this Court has jurisdiction to review a judgment of the Supreme Court of the State of Oklahoma, involving a construction of this contract adopted under authority of an Act of Congress.

BRIEF AND ARGUMENT.

It is the contention of the respondents that the rule of law announced by this Honorable Court in the cases of *Barrett* v. *Van Pelt*, 268 U. S. 85, 45 S. Ct. 437, 69 L. Ed.

857; *Davis* v. *Roper*, 269 U. S. 158, 46 S. Ct. 28, 70 L. Ed 209, 44 A. L. R. 1357; *C. & O. Ry. Co.* v. *Thompson*, 270 U. S. 416, 46 S. Ct. 318, 70 L. Ed. 659, is controlling. These cases involved a construction of a proviso in Ch. 176, sec. 1, 33 Stat. at L. 1196-1199 (49 U. S. C. A. 20 (11)), reading as follows:

> "* * * Provided further, That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days, for the filing of claims than four months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice; Provided, however, That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

This proviso in this statute, in effect, is found in the uniform livestock contract, sec. 2, par. c (Tr. 88), under which the cattle in question were shipped.

The petitioner relied upon the notice provided for by sec. 4, par. c (Tr. 89) of said uniform livestock contract, which reads:

> "Before the livestock is removed from the possession of the carrier or mingled with other livestock the shipper, owner, consignee or agent thereof shall inform in (fol. 214) writing the delivering carrier of any visible or manifest injury to the livestock.".

and the alleged failure of respondents to give such notice, as a defense. (Second paragraph of answer to amended petition, Tr. 5-6.) The petitioner requested an instruction to the jury upon this point and this requested instruction was given (Tr. 146-7). The petitioner is consistent by insisting in its brief that said sec. 4, par. c, of said uniform livestock contract is to be given an equal, if not a controlling, contemporaneous construction with the above quoted sec. 2, par. c, as construed by this Court in the cases above cited.

We are unable to find a decision by this Court construing the effect of both of these conditions in a uniform shippers' contract.

The first authority for the Interstate Commerce Commission to prescribe a uniform shipper's contract must be found in Ch. 104, sec. 20, 24 Stat. at L. 379-386, an Act of Congress of February 4, 1887, wherein it is said:

> "• • • Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements or contracts with other common carriers, as the commission may require;"

and as amended by an Act of Congress of June 29, 1906, Ch. 3591, sec. 7, 34 Stat. at L. 584-595, wherein it is said:

> "• • • That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in

another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed; * * *."

We have found a number of cases, among them *Northern P. Ry. Co.* v. *Wall,* 241 U. S. 87, 60 L. Ed. 905, 36 Sup. Ct. Rep. 493 (arose in 1912 and decided in 1916), in which the uniform shipper's contract then in use made the notice relied upon by the petitioner a condition precedent to the right of recovery. Whether this was a proper exercise of the Interstate Commerce Commission's authority to prescribe uniform contracts or not, the Congress of the United States saw fit to limit the authority of the Interstate Commerce Commission in this respect and to limit the conditions which the carriers might insert in the shipping contracts relating to notice of injuries or claims. This was done by the Act of March 4, 1915, Ch. 176, sec. 1, 38 Stat. at L. 1196, 49 U. S. C. A. 20 (11) supra. Since then the Interstate Commerce Commission has not had authority to prescribe, nor the carriers the right to include, provisions in a shipping contract requiring any notice or claim as a condition precedent to the right to recover for the class of damages involving actual negligence or carelessness

specified by this Court in *Barrett* v. *Van Pelt, supra;* or, to limit the time for giving notices or claims in other classes of damages to less than ninety days for notices of claim nor four months for the filing of claims. Therefore, sec. 4, par. e (Tr. 89), of the uniform livestock contract under consideration is invalid.

We have found a number of cases in which these two apparently conflicting contractual provisions are considered supporting the foregoing statement and we cite these cases for your consideration; *Wichita Valley Ry. Co.* v. *Baldwin*, — Tex. Civ. A. —, 270 S. W. 1089; *Erie Ry. Co.* v. *Callahan Co.*, — Ind. —, 184 N. E. 264; *Forkner* v. *Louisville & N. R. Co.*, 232 Ky. 579, 24 S. W. (2d) 290; *Hicklin* v. *Central of Ga. Ry. Co.*, 40 Ga. A. 297, 149 S. E. 286; *Hill* v. *Great Northern Ry. Co.*, 156 Wash. 567, 287 Pac. 665; *Evans* v. *A. T. & S. F. Ry. Co.*, — N. M. —, 20 Pac. (2d) 932; and *Louis Ilfeld Co.* v. *Southern Pacific Co.*, (C. C. A. 10th Cir.), 48 Fed. (2d) 1056. We desire to quote a portion of the opinion in this last case, which is the rule we seek to have applied herein:

> "The parties differ in construing the words 'notice of claim,' in the statute. Appellants contend that, where negligence is the ground of suit, the language of the amendment was broad enough to render invalid the stipulation for written notice of injury. Appellee insists that such notice was not meant to be excluded, and, the stipulation being valid, the failure to comply with it defeated a recovery.

"It must be conceded there is support for appellee's contention. The 'Uniform Livestock Contract' appears to have been prescribed by the Interstate Commerce Commission, and reflects its construction of the Amendment. 64 I. C. C. 357, October 21, 1921; 52 I. C. C. 671, April 14, 1919; 33 I. C. C. 682, May 7, 1915. And doubtless the Commission acted within the powers confided to it by Congress. *Missouri Pac. R. Co.* v. *Porter*, 273 U. S. 341, 47 S. Ct. 383, 71 L. Ed. 672. Great weight would have attached to a contemporaneous construction of the proviso if it is ambiguous in meaning. *Swift & Co.* v. *United States*, 105 U. S. 691, 26 L. Ed. 1108; *Allen, Collector* v. *Morsman, Trustee*, 46 F. (2d) 891 (8 C. C. A. Feb. 17, 1931); *National Lead Co.* v. *United States*, 252 U. S. 140, 40 S. Ct. 237, 64 L. Ed. 496. But it was long delayed and we are not convinced the meaning is in doubt.

"Counsel for appellee rely upon decisions holding that a protest against or notice of damage is not a notice of claim required by a bill of lading. *Anchor Line, Ltd.* v. *Jackson*, (C. C. A.) 9 F. (2d) 543; *Duche & Sons* v. *Mediterraneo*, (D. C.) 31 F. (2d) 496. In addition, several decisions in the state courts are cited which sustain defenses based on stipulations which required notice of injury. But none of these cases construed the Cummins Amendment.

"We are impressed that appellee depends on a construction of the proviso which is too narrow and technical to reach its full meaning. In *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 33 S. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, construing the Carmack Amendment to the Hepburn Act (49 U. S. C. A. sec. 20), which fixed liability for damages on initial carriers, it was held that theretofore liability was determined by the general common law as declared by the

Supreme Court and enforced in the federal courts, and by state policies and statutes, and that no uniformity of obligation or liability was possible until Congress dealt with the subject. There were other constructions of that amendment, which were reviewed in *Pierce Co. v. Wells, Fargo & Co.*, (Feb. 23, 1915) 236 U. S. 278, 35 S. Ct. 351, 59 L. Ed. 576.

"The Cummins Amendment was soon adopted with uniformity in view respecting liability upon contracts for interstate shipments, and declared unnecessary notice or filing of claims in negligence cases. We think the language used is not ambiguous, when considered in the light of this manifest purpose. It was doubtless intended to be complete, as a regulation of all matters pertaining to claims based on negligence. No room appears to have been left for a stipulation requiring written notice of injury, upon the theory of a distinction between that phrase and notice of a claim. The letter of the law would thus be made the basis of construction rather than its object. A notice of injury would serve no other purpose than to apprise the carrier of a claim for damages. It is obvious that, if a carrier is not entitled to notice of a claim, it is not entitled to notice of an injury, which has a claim as its object. As the reason for both is the same, they are therefore practically synonymous in meaning. And as was said in *Barrett* v. *Van Pelt*, 268 U. S. 85, 45 S. Ct. 437, 69 L. Ed. 857, it may reasonably be thought that, where the ground of suit is negligence, the carrier has knowledge of the facts or expects a claim to be made for compensation. In our opinion, the proviso in question was intended to prohibit a notice of injury as a defense."

It might be said at this point that the Supreme Court of the State of Oklahoma has consistently applied the rule

announced in the above cases and although its decision thereon is being attacked by this review, we nevertheless call the Court's attention to the case of *Deming* v. *M.-K.-T. Ry. Co.*, 138 Okla. 276, 281 Pac. 240.

The trial court instructed the jury that the giving of notice to the carrier of visible or manifest injuries to the cattle was necessary, which in our judgment was erroneous, prejudicial to us and too favorable to petitioner, and further instructed the jury that under certain circumstances such notice might be waived (Tr. 147-8). The petitioner contends that the instruction to the jury that such notice might be waived is error, which justifies or necessitates the reversal of the judgment. We call attention to the case of *Southern Pac. Co.* v. *Di Cristina*, 36 Ga. A. 433, 137 S. E. 79, involving the question under consideration in this review, wherein the court instructed the jury upon an extraneous and probably erroneous phase of the case, and the Georgia court disposed of the matter with the following statement:

> "Other grounds of the motion for a new trial assign error upon certain excerpts from the charge of the court, one of which was an instruction to the effect that if the shipment was handled by a railroad not specified in the routing, then the defendant railroad company would not have the right to rely upon the provisions of the bill of lading as to the filing of the claim within six months, the exception thereto being that a mere misrouting would not amount to an aband-

onment of the bill of lading or to a waiver of its terms. This point seems to have been theoretically well taken, in view of *Georgia, F. & A. R. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 36 S. Ct. 541, 60 L. Ed. 948; *Barrett* v. *Van Pelt*, 268 U. S. 85, 45 S. Ct. 437, 69 L. Ed. 857; *Davis* v. *Roper, Co.*, 269 U. S. 158, 46 S. Ct. 28, 70 L. Ed. 209, 44 A. L. R. 1357. If error was committed as alleged, however, we think it was immaterial in the present case, in the view which we take of the evidence upon the subject of negligence.

"Under the Act of March 4, 1915, amending the Interstate Commerce Act of February 4, 1887, as amended by section 7 of the Act of June 29, 1906 (U. S. Comp. St., sec. 8604a), it is unnecessary that the plaintiff shall file a claim within the time named in the bill of lading, if the loss or damage complained of was due to delay or damage while being loaded or unloaded, or damage in transit by carelessness or negligence. It would seem that an error such as here alleged would be harmless in any case which was actually submitted and tried on the theory of the defendant's negligence and in which the jury were required by the court to return a verdict in favor of the carrier if they found it was not negligent."

We say that a proper construction of the Act of March 4, 1915, supra, as embodied in the uniform livestock contract involved herein, will be that authority for requiring the notice provided for by sec. 4, par. c (Tr. 89), is not only lacking, but that such a condition in a shipping contract is invalid, and that it was not only unnecessary to give such notice under the facts in our case, but that the giving of such instruction relative to notice is harmless error, be-

cause it was in favor of the petitioner. Whatever erroneous limitations or qualifications the trial court may have placed upon the right of the petitioner to defend upon a failure to give such notice to it, they are not prejudicial to the petitioner because it was not entitled to such notice under the law upon the facts proved by us.

In addition to the cases cited above construing the Act of March 4, 1915, supra, we desire to call attention to *Hailey* v. *Oregon Short Line Ry. Co.*, 253 Fed. 569, *Radousky* v. *N. Y., N. H. & H. Ry. Co.*, 258 Mass. 26, 154 N. E. 334; *Hunt* v. *Hines, Director General*, 204 Mo. A. 318, 223 S. W. 789; and, *Am. Ry. Express Co.* v. *Rouw*, 173 Ark. 810, 294 S. W. 401.

CONCLUSION.

We respectfully urge in conclusion that this Honorable Court give the uniform livestock contract involved herein and the rights and obligations of the parties thereto a construction which will be in keeping with the intention of the Congress of the United States, as expressed in the Act of March 4, 1915, and as interpreted by the courts of last resort of many states and the Circuit Court of Appeals of the 10th Circuit. We submit that the proper construction of such Act is as important to the shippers of the country, and especially livestock shippers, who oftentimes must re-

ceive and take charge of their cattle under conditions which render the giving of such written notice before they are received or commingled with other cattle impracticable, if not impossible, as it is to the carriers of the country. It is equally important to both.

Respectfully submitted,

O. C. Stevens,

Tulsa, Oklahoma,

Counsel for Respondents.

SUPREME COURT OF THE UNITED STATES.

No. 200.—October Term, 1933.

Missouri Pacific Railroad Company, a Corporation, Petitioner,
vs.
Hartley Brothers, a Copartnership composed of F. M. Hartley and T. H. Hartley.

On Writ of Certiorari to the Supreme Court of the State of Oklahoma.

[January 8, 1934.]

Mr. Justice Butler delivered the opinion of the Court.

Respondents brought this action in the district court of Rogers county to enforce a claim for damages against the railroad company. May 4, 1927, they shipped seven carloads of cattle from stations in Arkansas to themselves at Delaware, Oklahoma. They delivered five loads directly to defendant and the other loads to connecting carriers that delivered them to defendant. It hauled all from Little Rock to destination. The shipments moved under uniform livestock contracts[1] issued by the initial carriers. They contain the following clauses:

"Section 2. (c) Claims for loss, damage, or injury to live stock must be made in writing to the originating or delivering carrier or carriers issuing this bill of lading within six months after the delivery of the live stock . . . provided, that if such loss, damage or injury was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery. . . .

"Section 4. (c) Before the live stock is removed from the possession of the carrier or mingled with other live stock the shipper, owner, consignee or agent thereof shall inform in writing the delivering carrier of any visible or manifest injury to the live stock."

Plaintiffs did not sue until after the expiration of the time specified in the contract for notice or filing of claim; and they did not,

[1]Prescribed by *Domestic Bill of Lading and Live Stock Contract*, 64 I. C. C. 357, October 21, 1921, before our decision, April 13, 1925, in Barrett *v.* Van Pelt, 268 U. S. 85. See Missouri Pacific *v.* Porter, 273 U. S. 341, 343, *et seq.* Louis Ilfeld Co. *v.* Southern Pac. Co., 48 F. (2d) 1056, 1057.

before suit, give notice of or make any claim against defendant or any of the carriers for the loss or damage sued for, § 2 (c), or give defendant the information specified in § 4 (c). Their petition alleges that some of the cattle were killed and others injured by defendant's negligence in handling the cars in which the shipments moved over its line. The answer denied negligence and alleged that plaintiffs had not complied with the quoted contract provisions. The jury returned a verdict for plaintiffs and the trial court gave them judgment thereon. The supreme court affirmed. 162 Okla. 194.

The first Cummins amendment to § 20 of the Act to Regulate Commerce, 49 U. S. C., § 20 (11), concerning the duty of carriers to issue receipts or bills of lading for interstate freight and their liability for loss or damage declares: "That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days, for the filing of claims than four months, and for the institution of suits than two years"; and, as here construed,[2] the proviso reads: "That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded or damage in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery." The phrase "carelessness or negligence" relates to each case of loss, damage or injury mentioned in the proviso and in such cases carriers are not permitted to require notice or filing of claim. *Barrett* v. *Van Pelt*, 268 U. S. 85, 87, 91. *C. & O. Ry. Co.* v. *Thompson Mfg. Co.*, 270 U. S. 416, 422.

Section 2 (c) of the livestock contract includes the language of the proviso and evidently is not intended to require notice of claim for any loss, damage or injury caused by the carrier's negligence. Section 4 (c) of the contract does not purport to make compliance with it a condition precedent to suit, and we need not decide whether in any case it could be so read. It does not expressly apply to loss or injuries caused by the carrier's negligence. If construed to cover such cases, the section would conflict with the proviso of the first Cummins Amendment.

Affirmed.

---

[2]Barrett v. Van Pelt, 268 U. S. 85. Davis v. Roper Lumber Co., 269 U. S. 158. C. & O. Ry. Co. v. Thompson Mfg. Co., 270 U. S. 416.